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THE ADMINISTRATIVE APPEALS TRIBUNAL OF AUSTRALIA

Administrative Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

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Table of Contents

REFERENCES

Unless otherwise indicated, all section numbers refer to the *Administrative Appeals Tribunal Act* 1975 (Australia), 1975, No. 19, as amended.

ABBREVIATIONS

AAT	The Administrative Appeals Tribunal
Act	The *Administrative Appeals Tribunal Act* 1975 (Australia), 1975, No. 19, as amended (unless otherwise indicated)
ACT	Australian Capital Territory
A.L.D.	*Administrative Law Decisions*
ARC	Administrative Review Council
Tribunal	The Administrative Appeals Tribunal (unless otherwise indicated)
SSAT	Social Security Appeals Tribunal

CHAPTER ONE

Introduction and History

This Study Paper is about an innovation in administrative law, the Administrative Appeals Tribunal of Australia. There is no parallel institution in Canada. The Tribunal was established by the *Administrative Appeals Tribunal Act* 1975, and opened its doors on 1 July 1976. It was established as part of a series of reforms in Commonwealth (federal) administrative law, which included the revamping of judicial review, the establishment of a Commonwealth Ombudsman, freedom of information legislation and an Administrative Review Council. The latter is an agency established for oversight and research in relation to the total package.

This paper will focus on the Administrative Appeals Tribunal (the AAT), though with tangential references to some other aspects of the reforms. The arguments in favour of an administrative appeals tribunal are canvassed thoroughly in an unpublished study on administrative appeals prepared for the Law Reform Commission of Canada (Wilson, 1986). The purpose of this Study Paper is to provide a different perspective, focussing more on a description and critique of the ATT in operation.

The plan for the AAT emerged in recommendations of the 1971 *Report* of the Commonwealth Administrative Review Committee (Commonwealth of Australia, 1971), often known as the Kerr Report after the chairman of the committee. This was a committee of lawyers, and unlike a Royal Commission, it was not established for any role of factual investigation. That report sets out the proposal for an administrative appeals tribunal in detail, but it is thin on supporting evidence or argument. Basically, the establishment of the Tribunal might be seen as reflecting the sentiment that "there has to be some kind of external appeal,"[1] coupled with recognition of the limitations of judicial review.

This paper is based on a review of the published literature and some unpublished papers; attendances at the Administrative Appeals Tribunal in Adelaide, Sydney, Melbourne and Canberra, observing proceedings and interviewing Tribunal members; attendances and discussions at four of the departments or agencies whose decisions are subject to appeal to the AAT; and discussions with other government officials, academic lawyers, and members of community groups that interact with the AAT. The field research in Australia took place in the period August-November 1985. The observations set forth herein are accurate to November 1986, except where otherwise indicated.

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1. Comment to the author by a senior Commonwealth administrator. This was typical of many other comments.

CHAPTER TWO

Jurisdiction

I. Formal Perimeters

The jurisdiction of the AAT began with appeals from only a few government departments and agencies, but it has gradually been extended so that the AAT now has a broad, but not quite general, jurisdiction in relation to the decisions of government departments and some administrative tribunals.

The initial jurisdiction was prescribed in the *Administrative Appeals Tribunal Act* 1975, but the additions have been provided for in the statutes dealing with the substantive subject matters. Thus, for example, recent extensions of AAT jurisdiction have been contained in the *Customs and Excise Legislation Amendment Act (No. 2) 1985*, the *Grain Legumes Levy Collection Act 1985*, the *Interstate Road Transport Act 1985*, and the *Subsidy (Grain Harvesters and Equipment) Act 1985*.[2]

No single phrase can be used to describe the jurisdiction of the Tribunal. Broadly speaking, but with considerable vagueness and inaccuracy, the jurisdiction might be said to relate to decisions of government departments and agencies that are adjudicative in character (though for reasons of constitutional law, they are characterized by the courts as "administrative"). Thus, for example, the jurisdiction of the AAT does not generally relate to the policy-making processes of the departments, to the preparation of legislation or regulations, to diplomacy, to the business operations of government, or to the provision of many services. It does include, however, decisions relating to the exercise of many discretionary powers.

Much of the jurisdiction of the AAT was novel. In some areas, however, the AAT took over the jurisdiction of an existing tribunal. Some of these were situations in which the volume of appeals to the external tribunal was small, so that a merger would produce some obvious advantages of scale.

With regard to most departments or agencies, the AAT may receive an appeal from a decision made at first instance, though there is often a requirement of reconsideration within the department or agency. In some areas there is also an intermediate level of appeal.

Social security matters are more complex. There is a process of reconsideration within the Department of Social Security, following which an appeal lies to a locally

2. "New Jurisdiction," (1986) Admin Review 105.

constituted Social Security Appeals Tribunal (SSAT). This tribunal makes a recommendation to the Minister (in practice, senior officials of the Department in Canberra). Most of these recommendations are accepted, but many are not. If the applicant is surviving and is not satisfied by the outcome of this process, an application may then be made to the AAT.

The AAT does not have jurisdiction in relation to some specialist subjects where there was already an appeal structure dealing with a substantial volume of cases. Perhaps the most significant example is income tax, though the jurisdiction of the AAT in relation to tax matters is currently being extended.

An itemized list of the jurisdiction of the Tribunal is contained in the annual report of the Administrative Review Council for 1984-85.[3] It includes, for example:

(1) *Air Navigation Regulations*: "Decisions refusing, suspending, varying or cancelling certificates or licences, otherwise than under reg 256 or 257;"

(2) *Biological Control Act 1984*: "Decisions not to hold various types of inquiry; decision not to publish a notice of proposed agent organism; decision to make an emergency declaration; revocation of a declaration; declaration of target organisms, agent organisms and existing released organisms where inconsistent with various findings;"

(3) *Great Barrier Reef Marine Park Regulations*: "Refusal to grant suspension or revocation of a permission to discharge or deposit waste;"

(4) *Marriage Act* 1961: "Refusal to register a Minister of religion as marriage celebrant; removal from register;"

(5) *Patents Regulations*: "Hearing by Commissioner on notice of opposition to restoration of lapsed application; grant or dismissal of application for licence where lapsed applications are restored; determination of application for restoration of a patent which has ceased; determination of application for licence;" and

(6) *Sales Tax Assessment Act* (*No.* 1) 1930: "Refusal to register a manufacturer or wholesale merchant; decision requiring security, requirement of fresh or additional security; decision prohibiting registered person from quoting a certificate; refusal to issue certificate; revocation of registration."

There is, however, no significant volume of appeals under most of these statutes. The largest volume of appeals (31.3% of all applications to the AAT in 1984-85) relate to the *Social Security Act* 1947. Other areas with substantial volume are workers' compensation for Commonwealth employees (10.5%), Customs, Excise and Diesel Fuel Rebate (9.5%), Isolated Patient Travel and Assistance Scheme (9.3%) and ACT rates, i.e., local property taxes in the national capital (4.6%). Applications under the *Freedom of Information Act* 1982 constitute a substantial volume of work for the AAT (17.6%), but they are not part of the subject of this paper.[4]

The jurisdiction of the AAT relates to the role of the Commonwealth Government both as the national government and as the local government in federal territories under its direct administration.

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3. Administrative Review Council (hereinafter ARC), *Ninth Annual Report: 1984-85*, 83-107.

4. All figures come from *ibid.*, 109.

The Tribunal is not self-motivating. For the jurisdiction to be invoked, there must be a grievor to play the role of applicant. Most applications are by individuals, but many are by corporations. The Commonwealth Government can also be an applicant. So too can an organization if the decision complained about relates to a matter included in the objects or purposes of the organization (section 27).

II. Scope of the Review

Where the AAT has appellate jurisdiction, the scope of the review is generally unlimited. It overlaps with judicial review to the extent that the grounds of appeal may include points of law or jurisdiction (*Re Brian Lawlor*, 177), but it is more extensive than judicial review in that the grounds of appeal may relate to the merits of the original decision, and the AAT may review the exercise of discretionary powers. Indeed, the Tribunal may exercise all the powers and discretions conferred by any relevant enactment on the person who made the decision under appeal (section 43(1)). This has been interpreted to mean that the AAT has a duty and not merely a power to review a decision on the merits (*Re Control Investment Pty Ltd (No. 2)*, 1981 at 91). Thus even where the original decision would be legally defensible on judicial review, the AAT is still authorized to substitute what it considers to be "the correct or preferable" decision (*Drake* v. *Minister for Immigration*, 1979 at 589). For example, on an appeal from the refusal of a pilot's licence, the AAT may decide not merely that the ground of refusal was improper, but also that the licence be issued.

Where the AAT decides in favour of an applicant, many of the decisions involve not the correction of manifest error but rather differences of judgment in marginal situations: for example, whether a person can qualify as "unemployed" when he spends part of his time helping in his wife's shop.

The scope of the order made by the AAT must often involve an element of discretion. In a workers' compensation case, for example, the AAT may decide simply that the claim should be allowed, leaving it to the administering agency to calculate the payments. In another case, the AAT may allow the claim and also specify the payments to which the claimant is entitled.

Generally a decision of the AAT is binding upon the department or tribunal that made the original decision. In deportation matters, the Minister may decline to implement a decision of the AAT, but that power is not used frequently. There are also certain situations in which the AAT may give an advisory opinion, for example, on an *ex gratia* payment.

A significant limitation on the scope of the review is the widespread use and statutory finality of "medical certificates." Often the issuance of such a certificate requires the resolution of questions of law, policy, or non-medical fact, as well as medical questions. Yet they are often binding on primary adjudicators and therefore also on the AAT.

III. Comparisons with Judicial Review

The advantages of the AAT jurisdiction, compared with judicial review, might be summarized as follows:

(1) Since the Tribunal is overtly engaged in an inquiry into the merits, evidence on the merits can be adduced, the argument on the merits is out in the open, and counsel need not strive to influence the Tribunal's perception of the merits in more subtle ways. This avoids the risk or suspicion that, when purporting to act only by reference to other criteria, a court may be influenced by an ill-informed judgment on the merits.

(2) The Tribunal strives to reach the correct or preferable decision on the evidence adduced at a hearing. Thus the process is more like a trial *de novo* than a review jurisdiction. Many and perhaps most of the cases in which the Tribunal changes the primary decision, otherwise than on a point of law, are cases in which the Tribunal has received evidence that was not considered in primary adjudication.

(3) Government departments are usually represented at the AAT by legal officers from those departments rather than by lawyers from the Department of the Attorney-General. These departmental lawyers might be expected to be more familiar with the subject area, with departmental goals and policies, with the evidence, and with the significance of the evidence.

(4) The AAT is often perceived as more accessible, particularly because applications may be made without representation by counsel. For example, very few customs cases ever went to the courts, but many now go to the AAT. One reason is that there is no risk of an applicant having to pay the respondent's costs, but another reason is that customs agents can act as advocates.

(5) The decision of a court on judicial review is commonly not dispositive. Often the best that the applicant can hope for is a reference back to the agency of primary adjudication for reconsideration, using a different procedure or different criteria. A decision of the AAT is generally a final determination of the substantive question.

(6) A case does not go to the AAT until the primary adjudicator has made a final decision. While this precludes the AAT from preventing an excess of jurisdiction in advance of the event, it has the advantage that the processes of the AAT cannot be misused as a delaying tactic.

IV. Comparisons with the Ombudsman

The differences between the AAT and the Ombudsman have been summarized as follows:

[1] Ombudsman review involves investigating complaints relating to defective administration; *whereas* AAT review involves determining what is the "correct or preferable" decision;

[2] The Ombudsman has recommendatory powers *whereas* the AAT has determinative powers;

[3] Ombudsman review can resolve simple oral complaints relatively quickly *whereas* AAT review normally occurs in an extended but more calculable time frame;

[4] Ombudsman review requires no initiative or expense on the part of a complainant beyond lodging a complaint and supplying the Ombudsman with information; *whereas* AAT review requires more enterprise, motivation and resources on the part of applicants;

[5] Ombudsman review may be initiated in a completely informal manner, such as by telephone, and conducted in an informal manner by the Ombudsman; *whereas* AAT review must be initiated by a written application within a prescribed time limit and normally is conducted via a formal public hearing;

[6] Ombudsman review may provide relief in cases where the decision in question is in accordance with a rule of law, statutory provision or practice but the Ombudsman is of the opinion that the rule, provision or practice is unreasonable, unjust, etc.; *whereas* the AAT is subject to the same legal constraints as the primary decision-maker;

[7] Ombudsman review involves the use of investigative techniques; *whereas* AAT review is primarily an adjudicative process involving, at least to some extent, the employment of adversarial techniques;

[8] Ombudsman review does not require that the citizen affected by defective administration be given an opportunity to appear before the Ombudsman; *whereas* in the course of review by the AAT, applicants are entitled to a hearing; and

[9] Ombudsman review is conducted in private with the affected citizen having a right to particulars of the investigation but no right of access to the material the Ombudsman has obtained during the course of the investigation; *whereas* AAT review is usually conducted in public with the affected citizen having the right to examine the material to which the AAT proposes to have regard in making its decision and a right to receive written reasons for that decision. (ARC, *Ninth Annual Report: 1984-85*, 10-11)

V. Concurrent Jurisdiction

The jurisdiction of the AAT does not exclude the possibility of judicial review, a complaint to the Ombudsman, or the pursuit of any other avenue of relief that may be available, such as complaint to a Member of Parliament.

As indicated in section IV above, there are various reasons why an applicant might prefer the Ombudsman to the AAT, or vice versa. The AAT is usually preferred to judicial review, but this is not always so, even where there is concurrent jurisdiction. For example, if a case involves only a point of law or jurisdiction that is destined to go to the Federal Court in any event, it might be more expeditious to go there directly on judicial review rather than on appeal from the AAT.

In practice, there is no significant duplication between judicial review and the AAT. An applicant does not usually try both routes concurrently, and if anyone did, the court has enough discretionary power to prevent a duplication of process. In particular, the *Administrative Decisions (Judicial Review) Act* 1977 provides that:

> 10.(2) (b) the Court may, in its discretion, refuse to grant an application ... in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason —
>
> ...
>
> (ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by ... another tribunal ... of that decision, conduct or failure.

Some applicants do, however, complain to the Ombudsman concurrently with appealing to the AAT. In these cases, the primary decision-making agency may inform the Ombudsman of the duplication, and the Ombudsman will generally suspend his inquiry, at least pending the outcome of the AAT proceeding. In this connection, subsections 6(2) and (3) of the *Ombudsman Act* 1976 provide, in effect, that where a complainant has exercised or exercises a right to have a complaint reviewed by the AAT, the Ombudsman shall not investigate or continue an investigation unless the Ombudsman is of the opinion that there are special reasons justifying the investigation or further investigation. Where a complainant has not exercised a right to go to the AAT, the Ombudsman may decide not to investigate, or to discontinue an investigation, if the Ombudsman considers that it would be reasonable or would have been reasonable for the complainant to go to the AAT.

In some situations, the Ombudsman may leave it to the AAT to deal with the primary issue but continue his investigation of a collateral matter. For example, suppose someone complains of (a) dilatory and oppressive procedures in primary adjudication, and (b) a negative result. The Ombudsman might suspend any investigation of (b), leaving that to the AAT, but continue his investigation of (a), which would not be dealt with in the AAT decision.

In 1985, the relationship between the Ombudsman and the AAT was reconsidered by the ARC in Report No. 22:

> The Council has concluded that the advantages of having overlapping jurisdictions outweigh their potential disadvantages because of the distinct natures of review provided by the Ombudsman and the A.A.T. It is the Council's view that possible problems with successive review are to a considerable extent overcome by the existing provisions relating to the Ombudsman's discretion not to investigate in cases where alternative avenues of appeal are available, and the time limits within which applications to the A.A.T. must be made. (para. 49)

Procedures were recommended later in the report, however, for the reciprocal referral of cases.

VI. Practical Restraints upon the Jurisdiction

Any government institution may ration the use of its resources. Where the institution is an adjudicating tribunal, there is seldom a rationing plan that is the output of any debate. The rationing occurs through such variables as cost, time (delay in the process), location, mysticism, intimidation, etc. The extent to which practical considerations of this type may limit the jurisdiction are discussed under the headings that follow.

VII. Jurisdictional Limitations on Effectiveness

It is usually clear in each case that the AAT has the authority to deal with the question that has been answered by the primary decision-maker, and to produce a different answer. It is sometimes less clear whether the AAT has authority to answer a different question. Yet if it declined to do so, the overall process could sometimes become like a game of Snakes and Ladders.

In workers' compensation and social security matters in particular, it is often important for therapeutic as well as other reasons that the final appellate tribunal should have jurisdiction to consider the whole case, and not merely a particular question. The AAT appears to accept this view, at least as far as social security benefits are concerned. Suppose, for example, someone applies for a social security Invalid Pension and the application is denied. After the intermediate stages of review and appeal, the applicant appeals to the AAT, still alleging entitlement to the Invalid Pension. If the AAT concludes that the applicant is not so entitled, it may still consider whether the applicant should be paid a Special Benefit, notwithstanding that this question may not have been considered in primary adjudication.[5]

There is, however, another limitation arising from the detachment and formality of the AAT. The Tribunal is not generally in a good position to explore rehabilitation possibilities unless the appeal relates specifically to rehabilitation. Even then, its procedures would often be too formal for an effective discussion of rehabilitation.

VIII. Freedom of Information

Apart from its appellate jurisdiction, the AAT also has an original jurisdiction in freedom of information matters. This aspect of the Tribunal's work is beyond the scope of this study.

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5. For a case discussing issues of this kind, see *Re Kay*.

CHAPTER THREE

Structure

I. The Formal Structure

In 1985 the Tribunal consisted of 59 members. The President is and must be a judge of the Federal Court (subsection 7(1)), and some other members have been concurrently judges of that court. The Deputy Presidents are senior lawyers who have held some previous judicial or tribunal appointment. There are also ''Senior Members'' who are mostly lawyers, and ''Members'' who are mostly drawn from other professions or occupations. Some of the appointments are full time. The others, including most of the members, are part time. Cases are heard and determined by a panel of either one or three members.

The Tribunal has a registry and regular hearing facilities at each of the major cities, generally with at least one Deputy President and other members being based there. The authority of the members is, however, not limited geographically. Many of the members are appointed for their expertise in particular subject areas, and hence there is a measure of specialization. Partly for this reason, many of the members travel frequently to deal with cases outside their base areas.

Most hearings are held at one of the base facilities, but in some cases a hearing may be held in one of the smaller towns or in a rural area.

II. Physical Plant and Staffing

Each base of the Tribunal consists of hearing rooms, offices and a registry. Sometimes the registry is shared with the Federal Court. The layout of each hearing room is the traditional layout of a court, with an elevated bench facing rows of tables and chairs for the parties and their representatives. There is also the witness box, designated places for Tribunal staff, and behind the parties, chairs for the public. In Canberra the arrangement is an oval shape, but it is not less formal.

The base premises are generally located in the ''legal'' part of town. One might have preferred them to be located at places where ordinary people might feel more comfortable, and which are also more accessible to the handicapped.

The physical plant is designed for an adversary process rather than an inquisitorial proceeding, although preliminary conferences are commonly held in a less formal setting with everyone sitting round a table.

The staff resources allocated to a hearing are substantial, typically consisting of an associate, two shorthand writers and an attendant.

There is no field staff, nor any other staff engaged for the investigation of facts. Thus the staffing of the Tribunal too is designed for an adversarial system rather than an inquisitorial process.

III. Urban Concentration

The servicing of small towns and rural areas is commonly a problem for government agencies as well as for business corporations. The AAT is no exception. In the major cities, an application to the AAT involves communication with an institution that is a part of the local scene. In rural areas, however, an applicant to the AAT may have to overcome any psychological or logistical problems that may be involved in communication with an institution in a distant city. This is particularly important because:

(1) Government officials in rural areas generally function with less peer-group contact and less supervision than in urban centres. Hence if any official is reaching conclusions in a manner that is illegal, arbitrary, sloppy, or even tyrannical, this may be more likely to occur in a rural area than in a major city.

(2) It is commonly believed that rural people may be more accepting of decisions made by Government officials.[6]

The problem of servicing rural areas reflects a limitation on almost any system of review in response to complaint, and it indicates why, in at least some subject areas, such a system of review cannot replace the need for review by random spot checks. The vulnerability of rural residents is reported to be recognized in the Department of Social Security, where the benefit control unit is said to undertake some selective surveys to identify any local distortions in decision-making.

IV. Appeals to the Federal Court

From decisions at the AAT, an appeal lies to the Federal Court on a point of law (section 44). As a matter of practical politics, there was probably no choice. The demand of the legal profession for such a right of appeal would be overwhelming.

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6. This point was mentioned in discussions with government officials.

This right of appeal has some advantages. In particular, it permits an authoritative decision to be obtained in situations where the law is unsettled, such as where different panels of the AAT have reached different conclusions. By enabling the Tribunal to receive the approbation of the legal profession and the judiciary, moreover, this structure probably equips the AAT with enough of an aura, status, and political clout to make its jurisdiction and its decisions accepted by administrators.

On the whole, however, the provision for appeal to the Federal Court may be counter-productive, reflecting the incidence of political power and an aesthetic yearning for a pyramidal structure rather than a rational analysis of public need. In particular, there does not appear to have been any real analysis of whose interests are promoted and whose interests are damaged by this further avenue of appeal.

The results in cases taken to the Federal Court have not been alarming. Indeed, the judgments have generally been well reasoned. The concern relates not to the decisions reached in those cases but to the spill-over influence on the AAT of the appellate jurisdiction of the Federal Court. For example, the existence of this right of appeal may explain why decisions of the AAT are generally much too long, and why they are written in the style of reasons for judgment of an ordinary court. Moreover, making a decision appeal-proof in the Federal Court and making it intelligible to the parties can be inconsistent goals. The source material referred to in the AAT decisions, furthermore, is generally the judgments of courts rather than the literature in the particular subject areas, which might well be more relevant in reaching the ''correct or preferable'' decision.

It can often be only by sophistry that one can distinguish ''law'' from ''policy,'' and the attempt to make that distinction in defining the jurisdiction of the Federal Court can tend to undermine the intelligent development of doctrine. If the Federal Court is perceived to be a step up from the Tribunal, it might not be too fanciful to imagine that it could be perceived in that way by some Tribunal members. If it is, an incentive is there to behave in ways that demonstrate one's fitness for the Federal Court rather than in ways that maximize the value of the Tribunal.

Perhaps worst of all, the appellate jurisdiction of the Federal Court is one of the structural features resulting in the AAT's operating on an adversarial rather than an inquisitorial model.

It would be extremely difficult for an AAT to meet the need for review of administrative decisions without a structure and *modus operandi* tailored for that purpose, and this probably requires a complete divorcement from the ordinary court system.

CHAPTER FOUR

Procedure

I. Awareness of Right to Appeal

When someone receives from a government department or agency a decision of a type from which an appeal lies to the AAT, the letter communicating the decision may also inform the recipient of the right to appeal. The jurisdiction of the AAT is also made known through general publicity, and it is well known to the various community agencies to which aggrieved citizens may go for advice.

Another useful development relevant to public awareness of the jurisdiction was the decision to prescribe all additions to the jurisdiction of the AAT in the statutes dealing with the substantive subject matters, rather than by amendment to the *Administrative Appeals Tribunal Act* 1975. Literature relating to a substantive subject area tends to draw from the statute law relating to that subject more often than from other statutes. For this reason as well as perhaps others, putting the right of appeal in the substantive statutes seems likely to increase the probability of the right becoming known to potential applicants.

II. Commencement of an Appeal

As a prelude to commencing an appeal, or as a prelude to deciding whether to appeal, a potential applicant may "by notice in writing given to the person who made the decision, request that person to furnish to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision" (section 28(1). See also Burnett, 1986).

An appeal must be commenced in writing, and may be commenced by completing a form ("Application for Review of Decision") made available by the AAT. It is a simple form, though perhaps some of the language could be less bureaucratic: for example, "I hereby apply ..." and "name of applicant." The form provides for the applicant to answer seven questions on a single page.

The application is made to one of the registries of the AAT. The registry notifies the department or agency which made the decision from which the appeal is taken, and that department is then required to lodge with the Tribunal, within 28 days, a set of documents as prescribed in section 37.

III. The Adversary Process

For the first four years of its operation, the AAT is reported to have been less formal, and perhaps a little more inquisitorial, than at present. Applicants proceeded more frequently without lawyers, and at least some government departments and agencies were represented by departmental officials who were not lawyers. Subsequently, however, the process became more formal and adversarial. Legal representation is now normal on the government side, and common also for applicants. The process is now almost indistinguishable from the adversary system in the ordinary courts.

It is not the adversary system in its most rigid form, and the Tribunal shows the same flexibility as the ordinary courts. For example, at a pre-hearing conference, a Tribunal member might suggest certain types of evidence that should be adduced.[7] Similarly, if a party appears without a lawyer, the Tribunal may lead the questioning, and may conduct a basic cross-examination of an opposing witness.

In some respects the Tribunal may go further. If a party needs the evidence of a medical expert but cannot afford the fee, for example, the Tribunal may call the physician as a Tribunal witness, thereby having the fee paid out of public funds. This is, however, more analogous to legal aid than to an inquisitorial process.

For the most part the Tribunal does not take a leading role in the investigation of a case, and indeed, unlike the Ombudsman, it has no staff for the purpose. The Tribunal relies primarily on the parties for initiative in the production of evidence and argument. The Tribunal is not precluded by statute from seeking further evidence on its own initiative and indeed, it has the power to "inform itself on any matter in such manner as it thinks appropriate" (paragraph 53(1)(c)), but in practice, that power is seldom used.

Although many applicants appear in person, the various features of the adversary system, including the design of the physical plant, may well deter others from doing so. For example, counsel for the department will generally stand to address the Tribunal, but for most people the delivery of a standing oration is not a part of their normal routine, and an applicant in person might not have the self-confidence to speak standing up in a public forum. If the applicant prefers to remain seated, the Tribunal will not object, but the distance is usually too great for that to seem appropriate. Furthermore if counsel for the department is standing when addressing the Tribunal, an applicant in person might well feel that her presentation would be perceived as second class if she does not do the same.

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7. For an example of a case in which the Tribunal was particularly helpful in this regard, see *Re Duncan*.

Again, applicants or witnesses who are not professional or business people can be worn down by the stress of the involvement with strangers in such an unusual and formal setting, and by the duration of a formal and unusual procedure. They can then be confused easily in cross-examination, particularly if counsel for the department is unfamiliar with the background, or if for other reasons the questions are misleading.

A hearing often involves bringing together for the first time people of diverse backgrounds and who usually move in different circles. The applicant, who may have come from a small town to the bewilderment of a major city, enters a building and an arena that is strange to him but familiar to the Tribunal members. The educational level of the applicant will usually be lower than that of Tribunal members, and his occupation will commonly be one that does not involve communications skills. It would surely be easier and fairer for the Tribunal members to adapt to his style of communication than to demand of him that he should adapt to theirs. Inviting him to "present his case," for example, has an air of pontifical insensitivity. As David Wilson has put it:

> Formal procedures are likely to intimidate members of the general public and force them to seek legal representation or forego the challenge entirely. As a result the accessibility of review proceedings and the opportunity of the affected public to participate in decision-making may effectively be limited. Formality may also foster an adversarial climate and thus make it more difficult to quickly, creatively and amicably settle disputes. For the same reasons formality tends to drive up the costs of proceedings and increases the likelihood of delay. (Wilson, 1986: 14-15)

Preliminary documentation can also be intimidating. For example, it is now required that the department deliver an affidavit of response, which an applicant will often receive about a week before the hearing. This sets out the position of the department. To those familiar with the adversary system, this seems like a well-intended attempt to ensure that an applicant is aware of the case to be met. Yet even the word "AFFIDAVIT" can be intimidating when it appears in block letters at the head of a document setting out the case of a government department. Moreover these documents tend to use a bureaucratic style that an applicant may well feel unable to match: "I have formed the view that ..." rather than "It seems to me that ...," for example. After receiving these affidavits, a proportion of applicants withdraw the proceeding, or fail to appear at the hearing. The official explanation is usually that they must have been convinced by the reasoning in the affidavit. An alternative hypothesis is obviously that they were mystified or intimidated by the legal formality and came to see the process as being so dominated by officialdom that they would not be able to communicate comfortably or effectively in any further attempt at participation.

The statistics support the concern, or at least are consistent with it. For 1984-85, 24.2% of the cases finalized are recorded as having been withdrawn by the applicant, and another 6.5% were finalized by a decision to continue only if the parties so request (ARC, *Ninth Annual Report: 1984-85*, 112). It is hardly surprising that the AAT has been described as "a body with which most barristers would feel quite familiar" (Giles, 1980: 37). What is surely needed is a Tribunal in which ordinary people can feel comfortable. The comment that "you have to be miracle person to survive it" (quoted in Palk, 1983: 91), is obviously an exaggeration, but it expresses a common feeling.

Sometimes, and perhaps frequently, the impeding influence of the adversary system is overcome. An example was observed by the author in a social security case

involving an application for a Handicapped Child's Allowance. A husband and wife were appealing to the AAT without the assistance of a lawyer. Examination and cross-examination of the husband proceeded slowly and ponderously. By the time that the wife came to be cross-examined, it was obvious that the couple was honest and straightforward. Cross-examination was unnecessary to test credibility, and counsel for the department seemed to be cross-examining the wife only to elicit further information. At about the third question, the wife replied "I don't know." The husband interjected "I can tell you." No one prevented him, and he answered the question. Counsel for the department and the presiding Tribunal member both seemed to recognize that a relaxation of formal process would be more efficient, and counsel for the department began her next question: "Perhaps one of you could tell me ...." From that point, the formal routine of the adversary process broke down. There was a free-flowing discussion and the inquiry was completed more expeditiously.

It is a sobering reflection, however, that the initiative in moving to a more expeditious procedure came from one of the applicants in person. One cannot help suspecting that the ponderous formality of the adversary process might well have continued if both sides had been represented by counsel.

Another consequence of the adversary process is that some government departments and agencies do not want to expose their personnel to the risk of cross-examination, and to minimize that risk (as well as sometimes for other reasons), they prefer not to have them present at all. Thus the key people may be absent, with the department being represented only by a lawyer who may not know the answers to questions from the Tribunal, or from the applicant.

The adversary process can also aggravate scheduling problems, particularly when both sides have counsel and if expert witnesses are being called for each side. When a case involves human disablement (a substantial portion of the AAT workload) this formal and drawn-out process can sometimes inflict therapeutic damage (Ison, 1986).

Government counsel often try to mitigate the worst evils of the adversary system by playing more the role of an *avocat général*, but this effort can be limited, and perhaps even misleading, if a partisan posture has been taken within the department or agency in the preparation of the case. For example, in a workers' compensation case observed by the writer, the questionnaire from the government agency to a consulting psychiatrist invited an opinion on whether the disability resulted from employment. If the response was affirmative, the psychiatrist was asked to justify the opinion with more detail, but no such justification was requested if the response was negative.

It is possible that government systems of financial control may enhance the formality. The Tribunal may recognize a need for the testimony of the family doctor, for example, but some formality in the process may be a perceived prerequisite to the payment of a fee. As a Tribunal member explained: "I cannot authorize payment of a fee unless I order a summons to appear. We cannot pay him a fee for him to talk to us on the telephone."[8]

The formality of the process is not required by the Act. On the contrary, the Act provides that "the proceeding shall be conducted with as little formality and

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8. For a discussion of the statutory provisions relating to this, see *Re Sullivan*.

technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit'' (paragraph 33(1)(b)).

There are, of course, some relaxations. For example, counsel for the department might sometimes respond to questions from the Tribunal in a sitting position rather than standing, and the Tribunal will probably not object. Adherence to the formal processes of the adversary system seems to be maintained not by any explicit demands of Tribunal members made in the course of a hearing, but by the design of the physical plant, by the prescribed forms and procedures, by the staffing and budget arrangements, by the criteria used for the appointment of Tribunal members, by the habits of the Bar, by the inclinations and gestures of the legal members of the Tribunal, and by what the Bar and others understand to be the preferences of Tribunal members. The statutory directive against formality has no hope of implementation in the face of those pressures.

When an applicant is unable to cope with the demands of the adversary system, the response varies among different Tribunal members, and perhaps may also vary with the complexity of the matter. Occasionally the Tribunal will adapt to a style of communication more understandable by the applicant, but sometimes the Tribunal will suggest that the applicant should seek legal aid. As well as introducing another hurdle and another delay, this latter course tends to enhance the commitment to the adversary process. It can also result in costs being imposed on State legal-aid funds.

Adherence to the adversary model can raise another difficulty when the agency from which the appeal comes is an adjudicating tribunal. Understandably, such a tribunal may not wish to be seen in an adversarial role in a case in which it has adjudicating responsibilities. Once the process is perceived as adversarial, therefore, it follows almost logically that the government side should be represented by some other department or agency.[9] In workers' compensation matters, the Commissioner for Commonwealth Employees' Compensation arranges for the Department of Social Security to present the government case. This compounds further what is already a problem with the system: too many participants for efficiency and for any depth of understanding.

In response to complaints of excessive formality, the story is often told of a hearing at which someone made a joke, with resulting laughter. The applicant was incensed because he thought that they were making fun of him. This story, however, is plainly irrelevant. Of course frivolity is objectionable at a hearing, but frivolity is not a synonym for informality. Frivolity is not the converse of formality, and indeed, the two can easily coincide.

What is surely needed is an inquisitorial system in which advocacy plays a supplemental rather than primary role. This would probably mean changing the criteria for appointments to the Tribunal so that experience in the adversary system is seen as a disqualification (or at least as a handicap) rather than as a qualification.

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9. Though there would seem to be no general legal objection to a commissioner or tribunal appearing as a respondent. In one case, the High Court of Australia decided that it was permissible for a tribunal to appear as a respondent on an appeal (*Fagan* v. *Crimes Compensation Board*, 1982).

IV. Scheduling of Hearings

The scheduling of AAT hearings throughout the country is arranged in Canberra. It is not clear, however (or at least not clear to the author), whether this represents any real advantages in efficiency.[10] At the very least, it enables scheduling to be organized on a national basis with members being dispatched from their base cities as required, and it enables the President to take into account any special expertise or perceived bias of Tribunal members when composing panels.

A disadvantage is that when a hearing needs to be adjourned, the Tribunal may not be able to confirm with the parties a date for the resumed hearing until approval of the date has been obtained from Canberra. The ease with which members can be moved between cities can also have negative influences on the health of members, and on the Commonwealth budget.

Centralized scheduling can also be a negative influence on procedural flexibility by enhancing the perceived need both for a single-event "trial" and for thorough preparation for that event by pre-hearing conferences or directions hearings. In this way it is another structural feature promoting an adversarial rather than an inquisitorial process.

V. Pre-hearing Conferences

The preparation of a case for hearing generally includes at least one and occasionally as many as six or seven preliminary conferences or directions hearings. These are generally conducted by a single member, often one of the part-time members. The member conducting a pre-trial conference is generally not a member of the hearing panel for the same case, though he may be in some cases by consent of the parties.

Sometimes these events are conducted with the same ponderous formality as hearings. For example, a pre-hearing directions hearing observed by the author was held in the "courtroom" with the Tribunal member sitting on the "bench" while counsel faced the presiding member from a distant table. The proceeding began with an exchange of bows, and throughout the procedure, counsel were standing or sitting according to whether they were speaking or listening. Even then, the only achievement was to approve an adjournment by consent.

More commonly, preliminary conferences are held in a smaller conference room with everyone concerned sitting around a table. At preliminary conferences observed by the author in this environment, the process took more the form of a free-flowing discussion in an atmosphere of constructive accord. The telephone is also sometimes used for preliminary conferences, but it is rarely used for hearings.[11]

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10. As with any centralization of this kind, there is always the alternative hypothesis that it may reflect the "mother-hen syndrome" sometimes found at the head offices of government or corporate organizations.

11. For an example of a case in which telephone communication brought about the resolution of the complaint, see *Re Duncan*.

These preliminary conferences can serve a range of purposes, including exploring the possibilities of settlement; narrowing the issues; enabling each party to obtain a clearer understanding of the position of the other; settling the types of evidence to be prepared and by whom; and establishing a time for the hearing (subject to scheduling in Canberra).

There are, however, significant problems resulting from the use of preliminary conferences. One is their contribution to delay, particularly in cases where there are several such events. Each must be followed by the scheduling of the next. Where the parties are represented by lawyers (and sometimes also in other cases), this can involve a search for the next date that will be vacant in the diaries of several busy people.

Again, points covered at a preliminary conference are not generally recorded to provide material for the hearing panel. Hence an applicant may not understand the discontinuity, and may not appreciate the need to explain everything all over again at the hearing. Perhaps more importantly, preliminary conferences can become rituals which are unproductive, or which produce only small steps towards the ultimate resolution of a matter.

Where the parties are represented by lawyers, the applicants and departmental officials may not want to attend or may not be invited to attend such events, and it is normal for counsel to attend without them. Yet counsel may not have the background knowledge of the case to discuss the settlement possibilities or the procedural options, or to understand what alternatives are acceptable to the client, or even to know what evidence is available. At one preliminary conference attended by the author, the Tribunal member asked approximately twenty questions. Counsel were able to answer barely three. Another date was set for counsel to answer the others.

There is also the risk that on questions of relevance, the ideas of the Tribunal member conducting the conference might differ from those ultimately held by the hearing panel.

Here again the AAT appears to have copied the processes of the ordinary courts rather than to have designed a process more suitable to its own role. For example, one might have thought it more appropriate simply to call a meeting for the resolution of each case (except where a meeting is unnecessary). The overwhelming majority of cases could be resolved in that way, and for those that could not, a date could be established for a further meeting.

Under the present structure, the first meeting (preliminary conference) is dispositive for cases that are settled or abandoned, or which the department concedes. Under the proposed alternative, the first meeting would be dispositive not only in those cases but also in others that could be adjudicated without further delay.

The most useful purpose of preliminary conferences appears to lie in resource allocation within the Tribunal. The more senior talent is reserved for the cases that are not settled, abandoned or conceded. Even this, however, is not an unmixed blessing. In particular, it means that the more senior talent is not used to help reduce delays.

VI. Burden of Proof

Common law notions relating to the burden of proof should generally have no place in administrative adjudication. Indeed, this has been recognized in the Federal Court:

> the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law.... The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution.... There is certainly no legal onus of proof arising from the fact that this is an "appeals" tribunal.... [T]here is no presumption that the administrator's decision is correct. (per Woodward J. in *McDonald*, 9-10)

Obviously a burden should be and is placed upon a party to adduce such evidence as it has, particularly of matters lying peculiarly within the knowledge of that party (see, e.g., *Re Reeve*, and also *Re Keane*). In deportation cases, moreover, a burden of proof lies on the Minister to show that a deportation order is justified (Taylor, 1984: 5073).

With regard to any general burden, however, there is theoretically no burden of proof on anyone except the AAT. Nevertheless the adoption of an adversarial model of adjudication seems to mean that in practice there is commonly a general burden of proof on the applicant (see e.g. Ross, 1980: 30-31, and *Re Holbrook*, 1983).

VII. Delay

Another consequence of adopting an adversarial model is that the AAT has no capacity for prompt adjudication. Most cases are processed over a period of at least six months from application to decision, and it is common for the time to be in the range of one to two years. Moreover, this delay can occur after a matter has already been subjected to substantial delays in the processes of primary adjudication and reconsideration. It is clear that delay in government processing is a major concern among the public:

> Possibly the most universal complaint from users of the services surveyed was about the time involved: time taken to receive attention; time taken to get matters sorted out when something had gone wrong; and time elapsing before the service applied for was delivered. (Royal Commission on Australian Government Administration, *Report*, para. 6.2.3)

Once an application has been made to the AAT, part of the delay can occur at the initial stage when the department or agency responding to the application must prepare the documents prescribed in the Act. The 28-day time limit prescribed for this (section 37) is commonly exceeded. One cannot help thinking that in many cases, the lapse of time could be avoided simply by having the agency send a photocopy of its file.[12]

12. This could also help to solve the problem of relevant documents not being filed by the department with the AAT which ought to have been filed. This problem does exist (see e.g., *Re Mutimer and Australian Telecommunications Commission*, 1984), though of course there is no measure of its extent.

Further delays occur as pre-hearing conferences or directions hearings are arranged to fit the schedules of all concerned, and of course the hearing itself is arranged to suit the schedules of advocates and any expert witnesses, as well as the Tribunal members. After the hearing there is often a further delay before the decision. Indeed, "there is a theme ranging from disappointment to dismay at the time which so often occurs between the hearing and the handing down of the decision (Skehill, 1980: 52).

These delays can inflict therapeutic damage, particularly in social security and workers' compensation cases (Ison, 1986). On social security matters it has also been noted that:

> Cash reserves (if any) have been depleted and psychological confidence shattered. As a consequence they do not have the luxury of being able to tolerate time-consuming delays in the application, payment or review processes. For this group there is no longer an economic or psychological cushion to protect them against the social costs of delay. (Carney, 1982: 35)

In cases involving business interests the delay can, of course, result in economic damage. Delay can also operate to the prejudice of third-party interests:

> Those who rely on the finality of an administrative decision can suffer considerably while awaiting the outcome of an appeal. These effects may extend beyond the immediate parties in the dispute to others who have an interest in the outcome. (Wilson, 1986: 13)

Delay can be a negative influence on efficiency in other ways too. For example, perhaps because of changes within the respondent agency, within the offices of the advocates concerned, or within the AAT, delay can increase the number of people involved in a case; even without the delay, the number involved would usually be too many for the efficient resolution of the matter.

Some of the negative impacts of delay can occasionally be mitigated by interlocutory orders. For example, if a pilot's licence has been suspended, the AAT may order a stay of the suspension pending the appeal; understandably, the Tribunal will only do that if the suspension was for misconduct, not usually where it was for an impairment of a medical nature. Similarly in a social security case involving the cancellation of support payments, the AAT may suspend the cancellation pending the outcome of the appeal (see e.g. *Re Dart*, 1982). Such mitigating interlocutory orders, however, still leave the risk of emotional damage from continuing anxiety pending a final decision, and in some cases also a continuing difficulty in future planning.

VIII. Representation

The use of the adversary system results in a clumsy structure with substantial risks of mistakes being made in the relaying of information or argument through representatives. Even the rectification of mistakes or the clarification of uncertainties is made more difficult, particularly when representatives are too remote. For example, if an AAT decision in a workers' compensation case is too uncertain or insufficiently detailed to be applied, the Commissioner for Commonwealth Employees Compensation must ask the Department of Social Security to apply to the AAT for clarification. Here

again, the network of communications that the structure involves is too formal, with unnecessary intermediaries and consequential risks of error as well as delay in the relaying of messages.

IX. Reasons for Decision

As mentioned above in section III, the reasons for decision produced by the AAT commonly read as if they were written for the Federal Court rather than for the parties. They are carefully prepared and thorough, but prolix, often with detailed citations of authorities, and they show deference to the advocacy by setting out and responding to all of the submissions of counsel. Here again the adversary system is dominant. The decisions read as if the Tribunal was adjudicating in matters of private law rather than playing a remedial and architectural role in matters of public administration and public justice.

Where a decision is complex, it is sometimes accompanied by a cover note to explain the matter in more simple terms to the applicant. This can make the decision comprehensible to the applicant, but it is another example of responding to the problems of the adversary system by the use of an addition, rather than by the more efficient and more economical alternative of a subtraction.

X. Orders for Costs

The general rule is that no party is ordered to pay the costs of another. Costs are, however, commonly awarded in workers' compensation cases, though rarely against the applicant. Generally each party meets its own costs, subject to the possibility of the applicant obtaining legal aid or some other form of assistance.

CHAPTER FIVE

The Influence of the Administrative Appeals Tribunal on the Operations of Government

I. Introduction

The operating cost of the AAT is probably high compared with the amounts involved in many of the cases. For example, in a social security case observed by the author, the issue involved a sum of A$877. The direct cost of the AAT decision could well have been at least four times that amount. Indeed, it is possible that the average cost of each appeal might exceed the average amount in issue, but this is hard to determine because many of the cases involve important issues of a kind that are not readily quantifiable in dollar amounts. The costs incurred by the agencies responding to appeals are also not easy to quantify, but on any view they are substantial.

> Responding to review, in whatever forum ... imposes severe resource limitations upon a Department actively challenged in its administration—resource limitations that in the present climate of staffing restraint can only be met by a concomitant reduction in action in other areas .... (Skehill, 1980: 42)

Thus any cost-benefit analysis of the AAT could leave a negative impression if the benefits were measured only by the results to individual applicants. For this as well as other reasons, it is important to consider the spill-over influence of the AAT, particularly on the departments and agencies from which the appeals are brought.

II. Information Flow

It is widely recognized that since the administrative law reforms, government has become more open. To a large extent the old civil-service veil of secrecy has been lifted. People who are subject to governmental decisions, or their representatives, now have access to the manuals of adjudicative criteria. They are better informed about adverse information, and they are better informed about reasons for decisions.

Because the three major reforms have had a combined impact, one cannot be precise in distributing the credit for these improvements among the AAT (in its appellate role), freedom of information legislation, and the Ombudsman. There is no doubt, however, that the appellate role of the AAT has been one of the beneficial influences.

III. Fidelity to Law in the Departments

The royal prerogative power once claimed by Stuart Kings to dispense with statute law, or to suspend its application, was extinguished, or thought to have been extinguished, in 1688 by the *Bill of Rights*. In contemporary Canada, however, there are generally no real sanctions to prevent the illegal revival of that asserted power by ministers or public servants. In Australia, the jurisdiction of the AAT has done much to fill that gap. Moreover, the perception in the public service of statute law as a sort of decorative literature, not of any real concern to us, is probably not now widespread. Indeed, the greatest achievement of the AAT may well be that it has induced a new respect for statute law in government departments and agencies.

Any written instructions or adjudicative guidelines that are inconsistent with statute law are now exposed more readily to a critical scrutiny. For example, the policy instructions of the Department of Social Security now go to welfare-rights organizations. Because of this exposure and the remedial structure established by the administrative law reforms, ministers and administrators are now more accountable to law.

To cope with this new accountability, many government departments have established new legal units, though they are not allowed to call them that. They usually operate under a title such as "Legislative and Review Branch," and the staff lawyers may be known as "Legal Officers."

The role of these legal units is not uniform, but it may include legal advice on such matters as the preparation of adjudicative manuals; staff training relating to legal criteria; preparation and advocacy in relation to cases being processed by the AAT; responses to the Ombudsman; advising on the response to freedom of information applications; and ad hoc functions, for example, relating to international organizations or parliamentary committees.

In other ways too, the new structure seems to have improved fidelity to law within the departments. For example, in social security, and perhaps also in workers' compensation matters, the legal criteria being applied are now less hidden behind medical certificates than they were before.[13]

Again, with regard to the Department of Social Security, the AAT decisions have produced changes in the substantive rules, for example, those relating to the Invalid Pension and Handicapped Child's Allowance. Similarly the instructions contained in the adjudicative manual relating to the "man in the house rule" were revised in response to AAT decisions.

Similarly, it has been reported with regard to customs and excise matters that:

> A consequence of AAT involvement in the main area of jurisdiction, determination of the amount or rate of duty payable on imported goods, has been the enunciation and clarification of general principles for the guidance of both primary decision makers and importers. (ARC, *Ninth Annual Report: 1984-85*, para. 61)

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13. This is a continuing problem in Canada and elsewhere.

It has also been reported that two of the AAT decisions in customs cases resulted in thousands of refund applications which involved the refunding of many millions of dollars (Skehill, 1980: 50).

In other ways, too, the AAT may be having a beneficial influence. For example, if a department wishes to preserve its relatively superior role in policy development by having its decisions binding on the AAT, it may promulgate its policy choices in the form of regulations rather than policy guidelines. This has the potential advantages of:

(1) exposing proposed regulations to greater public scrutiny;

(2) increasing the visibility of law as administered by the department; and

(3) improving the prospects for consistency in the adjudicative criteria being applied at different levels of adjudication.

Decisions of the AAT are, however, not treated in the departments with the same respect as decisions of the courts. There is a common perception that only courts can determine "law." Decisions of the AAT are treated as binding in the particular case, but it is commonly perceived that a discretion should be exercised at the policy-making level within the department as to whether an AAT decision should be followed as a precedent. With a decision of the Federal Court, the prevailing view seems to be that it should be followed as a precedent or appealed.

In some situations the departmental response to AAT decisions appears to have been half-hearted. For example, it used to be the practice of the Department of Social Security always to demand the recovery of any overpayment. The AAT decided that the recovery of overpayments is a discretionary power, and that therefore a discretion should be exercised in each case about demanding any recovery. The practice was then modified within the department so that the recovery of an overpayment would still be demanded in every case, but if there was a complaint following the demand, the case would be referred to Canberra for a discretion to be exercised. Responses as limited as this obviously produce an unequal justice to the benefit of those who complain and persist, and to the detriment of those who acquiesce in governmental decisions.

Another limitation on the significance of the AAT is that it acts only in response to an allegation of past injustice. It has no screening role to promote an ongoing fidelity to law. Thus while the jurisdiction of the AAT has extinguished or curtailed some inappropriate rules of thumb (such as the "man in the house rule"), it has not prevented other rules of thumb, which might well be inappropriate, from arising (a possible example might be the rule that a farm is deemed to produce an income for its owner of 2.5% of its capital value).

It has also been alleged in relation to the Department of Social Security that illegal restrictive policies have been implemented by the selection of physicians with negative views to act as "medical" advisers (Lucire, 1982). Here again, the AAT has had a beneficial influence, though its decisions have not necessarily ended the practice.

Several instances can be found of undesirable reactions to the administrative law reforms. For example, the head of one government agency informed the author that written instructions containing adjudicative criteria are now kept to a minimum. This reduces the risk of review alleging that the agency is following set rules instead of exercising a discretion.

The AAT decisions have also been less clearly beneficial with regard to the use of categorization in adjudication. In the design of any system, such as customs duty or social security, the designer must decide which and how many variables can be accommodated in the adjudicative process. The costs of administration and adjudication would be unacceptable and complaints of arbitrariness could be overwhelming if every case were to be seen as a matter for great contemplation, including the weighing of judgmental variables. To achieve a workable system at an acceptable cost, and one which is seen to be a system of justice according to law, it may be necessary to establish some broad categories; this, in turn, may produce some rough justice in marginal or exceptional cases. When a case reaches the AAT, the sympathetic circumstances of the particular case may be apparent in evidence, but not the large volume of other cases, nor the compromises made in the process of system design. Thus the AAT may be tempted to consider more variables than have been used in primary adjudication, and perhaps more than ought to have been used. A possible example might be the question of whether a student can qualify as unemployed.

This appears to be the problem that one administrative head had in mind when he said that:

> External review bodies like the Ombudsman and the Administrative Appeals Tribunal have no responsibility for the ongoing administration of the Superannuation and DFRDB legislation and for maintaining a consistent approach in decision-making. The administrator must be even-handed and cannot indulge in the luxury of selective decision-making based on sympathetic rather than objective grounds. What one does for one person should be done for all others in similar circumstances. At least when the Ombudsman proposes in an individual case a course of action that, if adopted, would present the administration with serious problems there is still an opportunity to respond and, by this further exchange, achieve an outcome satisfactory to the administrator. That same opportunity does not exist with the Administrative Appeals Tribunal. (Davey, 1985: 9)

The consequences can be negative in two respects. First, there is an obvious risk of injustice by making exceptions for those who appeal to the AAT. If the use of a broad category is defensible, its use ought surely to be binding on the AAT. Conversely, if its use is indefensible, it ought surely to be abandoned in primary adjudication. The second consequence in social security matters is that although the influence of the AAT has undoubtedly been beneficial in promoting fidelity to law, the insistence of the AAT that more variables are relevant has not always been accommodated very well by the department. Because of the reluctance to delegate to ordinary decision-makers the resolution of judgmental variables, the response to some AAT decisions has meant that more cases of certain types are being referred up the administrative pyramid for judgments to be made by people who are more senior, but who are also more remote from the claimants and who will not be receiving the evidence or argument firsthand.

In many of these situations, the solution should probably lie in a revised structure of primary adjudication rather than in any change to the appeal process.

A significant limitation on the influence of the AAT on fidelity to law within the departments is that the Tribunal does not have its own copies of the adjudicative manuals (or "police guidelines") used by the departments in primary adjudication. Nor does it receive the relevant portions of these manuals automatically in the course of adjudication. It receives them only if they are "put in evidence" or otherwise referred to by one of the parties. Commonly, however, this does not happen. The applicant may

not know of their existence, and counsel for the department may feel, probably correctly, that the argument for the department will be stronger if they are not mentioned. For example, if the case was decided initially pursuant to a manual directive or guideline that is indefensible in terms of the relevant statute, counsel may ignore the manual and strive to defend the decision by reference to the statute and perhaps other sources. Even if the manual is in accordance with the statute, counsel may see it as irrelevant to the appeal, and hence refer only to the statute.

This practice has three disadvantages:

1. The Tribunal precludes itself from using its own initiative to discover how the original decision came about. In some cases, this must weaken its capacity to determine the correctness of that decision.

2. Adjudicative criteria which are incompatible with the statute or otherwise objectionable may not be exposed to the corrective influence of the AAT.

3. Bearing in mind that the AAT is inevitably a law and policy-making tribunal, it could perform this role more intelligently if it always read the criteria documents being used in primary adjudication. For example, when over-riding (and perhaps effectively repealing) a departmental rule, or when creating a new one, the AAT could express the scope of its decision more precisely, and in terms that are more intelligible to the department, if it had a vision of how the decision could be reflected in the adjudicative manual. This in turn would enable AAT decisions to be integrated more easily and perhaps more quickly into the adjudicative manuals.

Here again the effectiveness of the AAT seems to be limited by its adoption of an adversarial model rather than an initiating and inquisitorial role.

IV. Influence on the Structure of Primary Adjudication

It has been explained above that apart from achieving the correction of error in individual cases, the AAT has been a beneficial influence in the correction of adjudicative criteria. Yet the most intractable problems with primary adjudication often lie not in the adjudicative criteria but in the management decisions relating to the adjudicative structure. On these problems it is less clear that the overall influence of the AAT has been beneficial. For example, it is reported that there is now more supervision in lower-level management in the Department of Social Security, whereas the real need is probably for an upgrading among primary adjudicators.

The main problem with primary adjudication is that it is commonly established on a bureaucratic model without the basic elements of procedural due process (e.g., see *Re Tobin*, 1977 at 7). In Australia, as in Canada, primary adjudication in government departments and agencies is often carried out by clerical-grade personnel who work under pressure in physical conditions that are not conducive to penetrating thought and who make decisions based only on the face of the available documents without any personal contact with the applicant, and without allowing the applicant any opportunity

to react to whatever difficulty there may be in responding affirmatively and fully to the application or request.[14]

For example, the delegates who decide Commonwealth employees' compensation claims never hold a hearing. Of course, hearings are not required as a normal routine. Many kinds of decisions can be made in highly automated ways, but there are other cases which require a careful gathering of evidence, discussion by the decision-maker with the party concerned, possibly field-work or other inquiries, and careful consideration of the legal and policy issues. Where a case requires that kind of careful consideration, however, the need does not suddenly arise for the first time on an appeal. The need was there in the first place, and it ought surely to have been met by a structure of primary adjudication that can deal with a case in that way.

It is important to bear in mind here that in workers' compensation and social security matters, many decisions require a process of medico-legal interaction that is just as demanding as in tort claims in the courts. If primary adjudication is weak, the chances are that the opinions of departmental doctors will decide the general issue, including questions of law, policy, and non-medical fact.

One aspect of the problem is that in several of the departments and agencies, there is excessive centralization. If primary adjudication is to function efficiently on an adjudicative rather than a bureaucratic model, it must be as local as possible. The problem was recognized in the *Report* of the Royal Commission on Australian Government Administration when it said that "more authority to reach decisions needs to be given to the officers at local levels, especially to those who deal directly with the public (para. 7.1.2 at 147). The proposals of the commission in this respect were not implemented on any broad scale.

It is sometimes alleged that primary adjudicators under these various systems are incapable of holding a hearing. If that is correct, however, the use of the bureaucratic model is not a solution. Indeed, anyone who is incapable of holding a hearing in cases where one is needed is certainly incapable of deciding those cases without a hearing.

The referrals to supervisors and others, which are often a part of the bureaucratic model, might appear to be a means of obtaining a useful second opinion, but even that can be an illusion. Often these referrals mean that the decision on a crucial matter has been transferred to someone who has had no first-hand contact with the applicant, and who has not received any other evidence or argument firsthand. These processes of referral, furthermore, can result in too many people being involved for efficient decision-making, with crucial information being lost in the retelling. Moreover, discussion within the department can become an alternative to enquiry outside the department, and concurrence can be an alternative to personal responsibility for investigation and decision.

The Royal Commission on Australian Government Administration recognized the problem, though it only went half-way in recommending a solution.

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14. In the Department of Social Security, claimants are interviewed by clerical staff (assessors) and the decisions are then made by determining officers (delegates), who make the decisions on the documents supplied to them by the assessors and usually without interviewing the claimants themselves. It is now official policy to offer an interview with the decision-maker at the stage of reconsideration (*Guidelines*, para. 8.1) but still not in primary adjudication.

> We *recommend* that arrangements for all programs which involve direct contact between a member of the community as "client" and a member of the administration be reviewed with the object of making the point of contact with the member of the public the point of decision also unless there are unusual considerations to be taken into account. Where the officer meeting the client is simply a processor of information through such activities as ensuring the correct completion of forms, there is often criticism. It will persist until the officer dealing with the public has sufficient status to be able to reach the decision after consultation with the individual concerned in all cases which do not involve special or unusual features. (Royal Commission on Australian Government Administration, *Report*, para. 6.2.7 at 130)

One would have thought that where special or unusual features require the transfer of decision-making responsibility to a more senior or specialized person, the responsibility for receiving the evidence and argument firsthand should still go with the responsibility for making the decision. Where an applicant is isolated from the decision-maker and is allowed to communicate only through an intermediary, there is often a sense of frustration or despair, and a sense of injustice (or to put it in terms more familiar to lawyers, a feeling that one is not being heard prior to the decision). There is also a risk of therapeutic harm, and of confidence in government being undermined, when a negative decision is reached by a process which the applicant knows to have been inadequate, particularly if a judgement on credibility has been made by someone who has never met the applicant.

An example of the consequences of the bureaucratic model might be seen in a social security case reported in 1985. An applicant for the Invalid Pension had lived in the same town for 44 years. The application was denied, apparently on the ground that he was not physically incapable of any kind of work, and that he might be able to obtain some kind of employment if he were to move. On appeal, the AAT concluded that it was not reasonable to expect the applicant to move himself and his family from the place in which he had lived for 44 years (*Roesler*, 1985).

As this case illustrates, serious injustices can arise when primary adjudication and the final level of appeal are not designed to accommodate the same range of judgmental variables. The result is very unequal justice as between those who persist and those who acquiesce in primary decisions. For this reason the availability of an appeal cannot justify the retention of a system of primary adjudication that is not designed to achieve the right answer in the first place.

There are further indications of impoverishment in the quality of primary adjudication. For example, in workers' compensation matters, diagnoses of malingering, secondary gain, or other psychiatric etiology can still be found to have been reached by way of exclusion.[15] A typical complaint of an applicant in person heard by the author of an AAT hearing was that "the [Customs and Excise officials] made a judgment before they inquired about the facts."

The statistics of the manner in which applications to the AAT are finalized also suggest continuing inadequacy in the quality of primary adjudication. In the year 1984-85, 32.8% of applications to the AAT were finalized as a result of the original decision having been altered by the decision-making department or agency (ARC, *Ninth Annual*

15. For such a diagnosis to be even passably scientific requires affirmative symptoms, and not merely the absence of any recognizable organic cause of pain.

Report: 1984-85, 112). Moreover, these would generally be cases in which the initial decision had already been reconsidered and confirmed within the department. Another volume of erroneous decisions made in primary adjudication will have been rectified on reconsideration.

It is arguable that the jurisdiction of the AAT, together with the other parts of the administrative law reform package, may have entrenched the inadequacy of primary adjudication by creating a palliative that has diverted attention from a solution. However, the adversary process of the AAT and the hearing by way of trial *de novo* mean that the AAT does not usually see the departmental file, and that it is not concerned with the manner in which the initial decision was reached. It may correct the substance of an erroneous decision, but it does not usually correct the process or the structure that produced the erroneous decision, and that may continue to produce such decisions.

Part of the explanation for the present structure may be that procedural fairness tends to be demanded by the legal profession, but the demand from that source does not arise until after a negative decision has been made about which a client consults a lawyer. If this is an explanation for the structure, it is still not a justification.

V. Reconsideration

One aspect of system structure that has not been improved by the creation of the AAT, and which may indeed have been aggravated, is the practice of reconsideration. It is a common practice that when a complaint is received after primary adjudication, the decision is reconsidered within the department or agency concerned. Usually this reconsideration is undertaken by a more senior person in the same office. Reconsideration is often prescribed by statute as a precondition of a right to appeal to the AAT.

This practice has been supported in the following terms:

> It is a waste of resources for expensive review machinery, such as the Administrative Appeals Tribunal or the Federal Court, to be set in motion unless the decision is one which the department or agency concerned has carefully considered and is prepared to back. For this reason, Commonwealth Legislation providing for appeals in the Administrative Appeals Tribunal commonly provides that a pre-requisite to the lodging of an appeal with the Tribunal is that the department or agency concerned has been asked to reconsider the decision, usually at a higher level than that at which the original decision was taken. (Curtis, 1985: 16)

There are, however, serious objections to the practice of reconsideration. Perhaps the main one is that it tends to weaken rather than strengthen the quality of primary adjudication. It tends to encourage a structure of primary adjudication that is sloppy or excessively automated, with no real thought being applied to a case at least until after the decision has been made and after a complaint has been received. Reconsideration promotes the practice of rejecting doubtful claims to see if the applicant complains, rather than investigating them to determine their validity. It is hardly surprising that when a decision is reversed upon reconsideration, it is often because of evidence that

was received for the first time at that stage, but which ought to have been sought and obtained by the primary adjudicator.

There is concern not only that reconsideration promotes an inadequate quality of primary adjudication, but also that the reconsideration is itself an inadequate mode of inquiry, and that it serves as an access barrier to the appeal system.

A departmental advocate has explained that

> very few of the actions initiated under either s. 28 or s. 37 involving our Department ever proceed to a hearing. In many cases we immediately recognize that the decisions involved are incorrect. On other occasions, once we provide a statement of facts and reasons, the applicant accepts that our position is correct. (Skehill, 1980: 44)

Both propositions suggest inadequacy in primary adjudication, and also in reconsideration. The most reasonable inference that can be drawn from those propositions is that the majority of decisions about which people are still complaining, even after reconsideration, are either ill-considered or not adequately explained to claimants.

> In many cases, an application for a review is only lodged with the Tribunal after a lengthy period of internal review and of correspondence between the Department and the would-be applicant. Through that process, each side would probably have explored in depth the reasoning of the other and bared its own soul in the course of so doing. (Skehill, 1980: 47)

This too seems to confirm that real discussion of contentious issues often takes place only after a negative decision has been made in primary adjudication and affirmed on reconsideration, and even then only when the applicant persists in a further complaint.

The statistical data also suggest inadequacy in the processes of reconsideration as well as in primary adjudication. For example, the SSAT statistics for appeals finalized in the quarter ending 30 June 1985 show that 32% of non-medical appeals and 36% of medical appeals were conceded by the Department without reference to the tribunal.

To maintain the pressure for an acceptable quality of primary adjudication, it is important that senior administrators and primary adjudicators know that if cases are badly decided at first instance, the magnitude of the inadequacy cannot be concealed from an appeal tribunal. An important aspect of this is that there is no reason to assume a correlation between suffering and complaining. The incidence of injustice is probably more extensive among those who acquiesce in adverse initial decisions than among those who jump the hurdles and pursue their complaints as far as the AAT. The quality of primary adjudication is, therefore, even more crucial than the quality of appellate adjudication.

Reconsideration resulting in the reversal of a decision might be seen to be beneficial, but the same benefit could have been achieved by channeling the complaint to the appellate tribunal and the department of primary adjudication then conceding the validity of the complaint. If the resulting statistics are an embarrassment to the department, that could be another pressure for the improvement of primary adjudication. Moreover, this change in practice would reduce the incidence of delay.

In cases where reconsideration does not result in a reversal of the decision, the process has involved further delay in bringing the matter to a conclusion. This cannot be seen as a small point. As mentioned in Chapter Four, delay can be a cause of

therapeutic damage in cases involving disablement, and in cases involving business interests, delay can cause difficulties in business planning. Moreover, the timing of the reconsideration process is in the hands of the department or agency, so that in practice it has a unilateral power to delay the progress of a case to the AAT.

Where a primary decision has been affirmed on reconsideration and the applicant does not appeal further, it is commonly assumed that the applicant must have been satisfied with the explanation that resulted from the reconsideration. The truth could be that the applicant has been so disheartened by the process that he has given up in despair. The structural requirement of reconsideration prior to any appeal puts a premium on persistence and tends to penalize those, perhaps people of more modest disposition, who give up after a negative decision is seen to have been officially confirmed.

Not only may potential appellants be disheartened by the reconsideration process, but there is also an obvious risk that the process will provide opportunities to discourage or deflect applicants from the appellate tribunal. Thus in relation to social security, it has been said that:

> it can safely be predicted that the [Review Officer] concept will deflect from the SSAT cases which ought properly to come before it leaving grievances unremedied. (Carney, 1982: 41)

There is a related concern in subject areas, such as social security, where the complainant may have a relationship of ongoing dependency with the department. If the complaint concerns the level of benefit, for example, the applicant may be apprehensive that if a complaint has been made and the primary decision has been officially affirmed upon reconsideration, persistence with an appeal at that stage might be seen as a hostile gesture inviting retaliation.

The process of reconsideration can also undermine primary adjudication by precluding the participation of more senior personnel. For example, in superannuation matters the Commissioner for Superannuation used to participate personally in some of the decisions made at first instance. Now he remains aloof from primary adjudication so that he can bring a fresh mind to the case in the event of reconsideration being required.

Apart from any negative implications for particular applicants, this practice can impede the intelligent development of policy. If a primary adjudicator cannot communicate with the head of an agency upon recognizing that a case being decided at first instance involves a policy question of broad application, the issue may not come to the attention of the agency head unless a negative decision is reached and a complaint is subsequently made.

Where an applicant is represented by a lawyer, the reconsideration process is sometimes treated as a useless formality. The lawyer saves the evidence and argument for presentation to the AAT. In these cases reconsideration involves waste and delay with no achievement.

It is suggested that processes of reconsideration are unfortunate, and that these structures ought to be abolished. Only in this way is the requisite pressure likely to be created for the required reforms in primary adjudication, and only in this way is the

requisite pressure likely to be maintained to preserve the continuing quality of primary adjudication. With regard to departments and agencies where the volume of complaints and appeals is relatively small, they could go straight to the AAT. Where the volume is too great for that, an intermediate appeal tribunal may be needed if one does not already exist.

These criticisms of reconsideration apply to situations where the review is by a bureaucratic process and the decision-maker is in or very close to the unit making the initial decision. They have nothing to do with review by an appeal structure when the decision-maker is sufficiently independent of the primary adjudicator, is in direct communication with the applicant, and there is a proper opportunity to be heard.

VI. Increased Documentation

While the AAT does not appear to have had a major influence on the improvement of procedural due process within the departments, its role does appear to have increased the documentation. Systems of recording information are reported to have been revised, memoranda of telephone conversations are now made and placed on the file in circumstances in which this was not done previously, and reasons for decisions (or at least what are said to be reasons for decisions) are now given in more situations. The head of one commission informed the author that where the decision is negative, the reasons are now so extensive that they include not only the conclusions of fact, but also a reference to the evidence supporting each conclusion of fact.[16]

The available time did not permit me to form any opinion on the extent to which these changes may be an improvement in efficiency or the extent to which they may be wasteful.

VII. Conflicting Policy Sources

The administrative law reforms do not make a formal change in the vehicles for the development of policy. Line management structures, special departmental units and ministerial responsibility remain the official modes of policy development, together with committees and ad hoc inquiries. Yet it is also axiomatic that appellate adjudication involves, at least potentially, a policy-making role. Hence the enactment of an appellate jurisdiction that is entirely separate from the departments creates an alternative policy source and the potential for conflict.

This has happened to some extent. For example, the position of the AAT on the social security Invalid Pension and other benefits relating to disabled people has been

16. This seems to reflect an overly strict reading of s. 28(1). The subsection requires "a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based." But the Act does not expressly require an itemized reference to the evidence in respect of each finding of fact.

less restrictive than the position of the Department of Social Security. In particular, the AAT has looked more at the economic significance of disablement and has felt less confined to the degree of physical impairment.

The problem can be exacerbated if, as well as appeals to the AAT, the ordinary courts are involved in the work of the same department. For example, the Department of Aviation is said to have suspended a licence for 12 months for low flying. On appeal to the AAT, the Tribunal concluded that a suspension for this length of time was a form of punishment, and the licence should have been suspended for three months, this being the time required to restore the airmanship of the applicant. If punishment was appropriate, it should have been imposed through criminal proceedings. The department took notice of that decision and reduced suspensions for misconduct to three months. It was said to have been criticized subsequently in a criminal court for being too lenient on suspensions.

The problem can be aggravated if there is inconsistency between different panels of the AAT.[17] In the case of an aeroplane pilot with a heart condition, the AAT is reported to have reached different conclusions on whether the Department of Aviation can issue a conditional licence requiring a co-pilot. Even if examples of this type are correct, however, they appear to be very few, and the AAT generally follows its own precedents. To the extent that there are divergent policy views among members of the AAT, these probably emerge not as different pronouncements of doctrine but in the weighing of evidence, or in different ways of classifying the facts (e.g., whether the evidence describing different features of a disability warrants the classification of "invalid").

The risk of conflicting policies emerging would obviously be substantial if the AAT ignored government policy statements, or practices reflecting government policy, but that is not the position. While the AAT is not bound by government policy, it does take it into consideration, at least in the exercise of discretionary powers. This position was endorsed by the Federal Court.

> It would be contrary to common sense to preclude the Tribunal, in its review of a decision, from paying any regard to what was a relevant and proper factor in the making of the decision itself. If the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the Tribunal to take into account in reviewing the decision. On the other hand, the Tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of determining whether the decision made was, on the material before the Tribunal, the correct or preferable one in favour of a function of merely determining whether the decision made conformed with whatever the relevant general government policy might be. (*Drake* v. *Minister for Immigration*, 1979 at 590)

It is commonly said that the AAT attaches greater weight to a government policy that has emerged in the form of a ministerial statement than to one that has emerged in the form of statements or practices at lower levels.

The AAT does not conduct what might be recognized as policy hearings. If a case raises a question of policy (perhaps in the guise of interpretation, or more overtly in

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17. For further discussion and argument about consistency and the use of precedent by the AAT, see (1986) 10 Australian Administrative Law Bulletin 150.

the exercise of a discretionary power) the AAT decides the matter on the evidence and arguments raised by the parties. It does not seek to broaden the input by giving notice to interest groups that might be affected by the result.

To avoid the risk of confusion from alternative policy sources, some levels of the public service avoid reading the AAT decisions. For example, some regional offices of the Department of Social Security have indicated that they do not want to see them. If an AAT decision is adopted at the head office of the department, they will receive the appropriate amendments to the instructions in their adjudicative manuals. They can then avoid any risk that their own interpretation of an AAT decision would be different from the interpretation at head office. Conversely, if the AAT decision is not adopted at head office as a precedent, they can avoid being confused by it. At the local or operations level of any government department or agency, there are obvious advantages in receiving direction from only one source.

CHAPTER SIX

Fidelity to Law

Comments have already been made in Chapter Five about the influence of the AAT on fidelity to law within the departments and agencies responsible for primary adjudication. Some further comments can be made about the influence of the AAT on fidelity to law within the processes of government generally, particularly with regard to interaction between departments and agencies.

Perhaps the most beneficial influence of the AAT has been in relation to social security. This might be explained on two grounds. First, it is axiomatic that the incidence of political power is not always the same in the design stage of a system and the legislative process as it is in subsequent administration. When a system is designed to meet the needs of relatively underprivileged and powerless groups in society, the design and legislative processes may be more idealistic, more principled, and more caring. Negative pressures on the system may operate more successfully in subsequent administration. This phenomenon has been observable in Canada in the provincial systems of workers' compensation, and it may do much to explain many of the problems found in those systems.[18] Where the system is one that involved the payment of benefits out of consolidated revenue, as in social security in Australia, the negative pressures might well operate through the Treasury.

Secondly, a system that prescribes statutory rights to payment out of consolidated revenue also creates a pre-emptive demand on that revenue. Fidelity to law requires that the budget of the department or agency administering such a system must have priority, up to the amount required to meet the statutory rights of applicants, over the budgets of other departments which involve discretionary spending. Yet there is an obvious risk that Treasury officials may not see it that way on a continuing basis, and that the high-profile political priorities of the moment, supported by powerful forces, may relate to discretionary spending. This risk may be enhanced if, as is usually the case, the Minister of Social Security is seen as a junior member of the Cabinet.

These phenomena may do much to explain why adjudicative criteria developed in the Department of Social Security have been found by the AAT to be unduly restrictive and in need of correction. It could well be that the AAT is improving the quality of the democratic process by bringing budget priorities more into accord with fidelity to statute law.

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18. For another perspective on this phenomenon, see M. Vosburgh, "Implementation Analysis: The Case of Accident Compensation in New Zealand" (1986) 9 Evaluation and Program Planning 49.

CHAPTER SEVEN

Overview and System Revision

The Administrative Review Council has an overall responsibility for monitoring the new structure of administrative law and for making recommendations on revision. In particular the Council makes the recommendations relating to developments in the jurisdiction of the AAT. This overview responsibility also includes the roles of the Ombudsman and of judicial review, and a mixed range of other activity. Recent examples include a review of pension decisions under repatriation legislation, and Australian Broadcasting Tribunal procedures.

The composition of the Council, however, tends to make it more political and less analytical than one might think ideal. The Council is to a large extent a "legal" institution, which has not developed research methodologies going much beyond those normally familiar to lawyers, and the published output of the Council relating to the AAT has not included any significant impact analysis. An Impact Project was undertaken by the Council from 1981 to 1984, but it was decided not to publish the results (ARC, *Ninth Annual Report: 1984-85*, at 8).

If an overview institution is to engage in performance monitoring measured by impact and not merely output, the role of the Director of Research in that institution would surely be the most demanding role in the whole system, and ought to be the highest paid. Yet the salary for the position of Director of Research at the ARC is much less than that of the President of the AAT.

Another limitation on the status and potential effectiveness of the Council is that its reports go to the Department of the Attorney-General, and officials of that department make the recommendations regarding acceptance and implementation. One would have thought that the Council itself should have at least the status of a permanent head (deputy minister) and that the responsible minister would be taking advice directly from the Council, not through a department.

Perhaps the most basic question is whether a council of this type is appropriate to determine expansions or other variations in the jurisdiction of the AAT. The risk is that with its focus on and affinity with the institutions of administrative law, the Council will exert a homogenizing influence, achieving consistency in institutional structures and procedures at the expense of substantive goals and policies. The author feels that expansions or other variations in the jurisdiction of the AAT ought to be considered in ad hoc studies that include the substantive law, goals and policies in the subject area, that can take account of the clientele in that subject area, and that are independent of the institutions responsible for the ongoing management of administrative law. Goal-oriented structures and procedures are surely more likely to develop if they are planned with a primary focus on the substantive subject matter than if they are planned under pressures for uniformity and with a primary focus on the institutions of general jurisdiction in administrative law.

CHAPTER EIGHT

The Dominance of Lawyers

A notable feature of the system is the dominant role of the legal profession. The President of the AAT and virtually all of the key full-time members are lawyers. The departments and agencies of government are now generally represented at the AAT by lawyers, and the legal units within the departments may play a key role in forming the departmental view of the AAT. An appeal from decisions of the AAT may be taken to the Federal Court, where again the legal profession is dominant. Key decisions and recommendations relating to the AAT, such as appointments, are made in the Department of the Attorney-General, which again is staffed by lawyers. At the ARC most of the key members of the Council and staff are lawyers. It is hard to find anyone in a key position in the structure whose primary background is in one of the social sciences, or in anything other than law.

Of course one would expect the legal profession to play a substantial role in any system of appellate adjudication, but if the system is to function in a manner significantly different from that of the ordinary courts, one would also expect more diversity of perspective. That surely requires more of the crucial positions to be occupied by people whose backgrounds are primarily in other disciplines.

This problem was recognized at the inception of the AAT.

> There is we think a risk that if the presidential members are all drawn from the practising legal profession, they will bring to their activities as members of the Tribunal, habits of mind and approaches which are not altogether appropriate to the Tribunal's functions. (Campbell, 1975: 5)

Unfortunately that warning was not heeded.

The dominance of the legal profession relates to the appellate structure. In some subject areas, lawyers are involved in the process of reconsideration in the departments, but they do not usually have an influential role in primary adjudication. Perhaps partly for this reason, notions of procedural fairness, fidelity to law, and other traditional ways of thought of the legal profession may well be underutilized in primary adjudication.

What seems to be needed is a more evenly balanced distribution of legal and other modes of thought throughout the decision-making pyramid. At present, legal modes of thought are dominant above a certain level while they are excluded or underutilized in primary adjudication. The result is a structure with a high risk of unequal justice.

CHAPTER NINE

Overall Evaluation

I. Introduction

It is not the purpose of this Study Paper to attempt a comprehensive judgment on the value of the AAT, but rather to describe its operation, to identify what the author perceives to be its strengths and weaknesses, and to identify variables that may be relevant in the consideration of any similar institution for Canada. Any overall judgment on its utility must obviously depend upon what weight one attaches to its positive and negative features, and also on what one sees as the alternatives.

II. Australian Reactions

Within Australia there are, understandably, various reactions. Favourable comments can be heard from those who have been associated with successful cases, from those who like the idea that "the bureaucrats are now more accountable," from those who see it as an advance for the rule of law, and from those who see it as an improvement on judicial review. There are also some grumbles, particularly about high cost, delay, unnecessary procedural steps, excessive formality, and unequal justice.

Obviously the creation of the AAT involved some curtailment of power within the departments, but any negative bias that this has produced in the reactions to the AAT could well be counterbalanced by an element of positive bias. A new industry is likely to spawn its satellite industries which have an interest in the continuing existence of the primary industry, and this appears to be the case for the AAT. If a government department or agency receives an enquiry about the role of the AAT, it will be understandable if the enquiry is referred to those having detailed knowledge of the matter. These would commonly be the legal officers in the Legislative and Review Unit. This unit came into existence in the first place partly as a result of the jurisdiction of the AAT, and hence its own future may be linked partly to that of the AAT.

For several reasons, perhaps including the one just mentioned, early resistance to the AAT appears to have diminished.

> The costs and apparent administrative complexity which resulted from the administrative law reforms, together with a dramatically sudden change from a closed system of government to one which operated in a more open manner led to a good deal of resistance.

> There is now evidence, I believe, that attitudes within the Australian Public Service have changed quite markedly in the past two years or so. (Curtis, 1985: 17)

The position of the Government in relation to the AAT is clearly supportive. The position of the Opposition is less clear. The Leader of the Opposition has announced that, if elected, the Opposition would undertake a reduction of government spending, and that many statutory bodies would be abolished. The announcement included an itemized list which does not include the AAT, though the list does not purport to be exhaustive.[19]

III. Comparison with Specialized Appellate Tribunals

On the merits of an AAT structure compared with those of more specialized appellate tribunals, the weight of the arguments is bound to vary from one subject area to another, and it would be a mistake to assert any general conclusion. Some general comments, however, can be made.

The AAT structure will often have some comparative advantages. The breadth of the jurisdiction may enable the AAT to function with more independence from political or departmental pressures than might be possible for an appellate tribunal of more specialized jurisdiction. Furthermore, the unit cost may sometimes be lower in subject areas where the volume of appeals is very low.

It would be wrong to see the AAT as a generalist tribunal lacking in specialist knowledge. In some subject areas the volume is so large that the members are bound to become familiar with them. Moreover, the part-time members often have specialist qualifications or experience, and to a certain extent even some of the full-time members specialize. Thus the AAT is able to capture some of the advantages of a specialized tribunal.

On the other hand, there are some situations in which one would expect a specialized tribunal to be more efficacious. One is where the same subject matter requires a series of decisions over time, and where consistency and co-ordination are of paramount importance. Another may be where decisions of an adjudicative nature must be interwoven with field-work and the provision of services.

IV. Achievements of the Administrative Appeals Tribunal

For the cases with which it deals, the AAT commonly achieves the rectification of a serious injustice. It is important to note that many of the decisions reversed by the AAT are not merely wrong, but horrifyingly so. For example, in one case an Invalid Pension had been cancelled by the Department of Social Security on the ground that

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19. Reply to the Budget by the Hon. John Howard, MP, in *Parliamentary Debates*, new ser., vol. H. of R. 150 at 502 (21 August 1986).

the applicant's back disability was not permanent because he had (understandably) refused to undergo a laminectomy, with its attendant risks (*Re Korovesis*, 1983).

The AAT has also had a most salutory influence in the enhancement of fidelity to law within the departments. Other achievements have been mentioned under the preceding headings.

V. Limitations of the Administrative Appeals Tribunal

Several limitations on the effectiveness of the AAT have been noted earlier. Perhaps the most severe limitation is the incapacity of the AAT to reform the structure of primary adjudication. Although the current structure includes many variations among the departments and agencies of government, it is not uncommon to find that the total adjudicative structure consists of:

1. Processes of primary adjudication in which decisions are made in a fairly automated manner in response to documents, often standard forms, by people who are frequently working under pressure in an open floor plan and who are not considered to have the educational background or intellectual capacity to be entrusted with the application of judgmental variables. It is sometimes part of the structure that any interviewing should not be done by a decision-maker. Thus even if an applicant is interviewed, any evidence or argument may be received by the decision-maker only second-hand.

2. Reconsideration, which again may be simply a response to documents, but which may include oral communication with the applicant.

3. The AAT, operating on a due-process model.

In several respects this appears to be the reverse of what is needed. The need for various features of a due-process model varies with the gravity of a matter, the kinds of issues involved (e.g., whether there is a credibility question) and the extent to which the adjudicative criteria are judgmental. In a serious and complex case, however, the need for various features of a due-process model does not arise for the first time on an appeal. It is at least arguable that the need is far greater in primary adjudication.

Other limitations or disadvantages of the AAT structure, particularly those related to the adversary system, have been discussed earlier. Further disadvantages flow from the separation of powers. For example, if the AAT concludes that a claimant should receive a payment, but there is no statutory authority for it, the Tribunal may recommend an *ex gratia* payment. The department then has to put the matter to the Minister of Finance, who usually refuses unless the department indicates that it plans to amend the legislation.

> The result for the applicant who has managed to withstand a lengthy, tiresome and possibly costly pursuit of his or her case all the way to the AAT is that at this point the battle begins once again, this time with another opponent, the Minister of Finance. If the Minister refuses to approve an Act of Grace payment, the applicant's chances of success, which might have appeared quite bright up until this point, rapidly diminish. (Palk, 1983: 117)

Again, the AAT and SSAT are often grappling to overcome system defects which cannot really be overcome without the concurrence of adjudicative experience and regulation-making powers. It can be exasperating for applicants to be told that the tribunal sympathizes with the obvious injustices they are suffering, but that because of the current state of the regulations it has no power to prescribe remedies. A measure of public cynicism is an understandable consequence if the only people by whom they have a right and opportunity to be heard are people who announce that they have no power to right the wrongs. This is probably one of the strongest arguments for the final level of appeal in relation to any structure of administrative adjudication being internal, and blended with regulation-making responsibility.

Another limitation on the effectiveness of the AAT structure is that, like most appellate systems, it seems designed to protect private interests rather than more dissipated public interests. This point has been raised regarding social security. It has been suggested that because the appeal process generally operates only one way, and in favour of payment, it creates a bias in favour of generosity and an upward pressure on the budget. The social security area, however, does not seem to be a valid illustration of the point. Any upward or generous pressure created by the appeal system is still modest compared with the strength of the countervailing pressures for restrictive practices. The balancing influence of the AAT simply brings the benefit criteria closer to those prescribed by the statute.

Perhaps more valid examples of the point can be found in licensing systems. If any licensing authority were to adopt restrictive practices, with licences being denied, suspended or cancelled unnecessarily, the aggrieved individuals might find an avenue of redress by applications to the AAT. But if a licensing authority were to be lethargic, granting licences without adequate inquiry, and failing to suspend or cancel licences when this ought to be done, it is unlikely that the jurisdiction of the AAT (even if it has jurisdiction) would provide a remedy in the public interest, and it is possible that a remedy may not emerge in any other way.

Probably the most serious examples would arise in pollution control. For example, under the *Environment Protection (Sea Dumping) Act* 1981, an appeal lies to the AAT from the refusal to grant a permit, the suspension and revocation of a permit, and the imposition of and refusal to revoke or vary conditions on a permit (ARC, *Ninth Annual Report: 1984-85*, 93). No appeal seems to lie from the granting of a permit, and even if it did, there may be no organization scrutinizing the permits to decide which ones to appeal. Thus if the appellate jurisdiction of an administrative appeals tribunal operating on an adversary model is applied to such matters as pollution control, it can become another bias in the system favouring corporate interests over public health.

VI. Transitory and Permanent Impacts

Any attempt at an overall evaluation also involves a difficulty in assessing which of the advantages and disadvantages are enduring, and which are transitional. Some of the most serious problems of the AAT, particularly those resulting from the use of the adversary system, appear to be entrenched, while some of the advantages could be

transitory. For example, the publication of adjudicative manuals and other aspects of "open government" resulted from the total package of administrative law reforms, including the appellate jurisdiction of the AAT. It is possible that the freedom of information legislation and the Ombudsman might now be enough to ensure the continuity of this publication and openness. On the other hand, the beneficial influence of the AAT in promoting fidelity to law in government is of crucial importance and is likely to be enduring. Moreover, it is unlikely that this need would be met in any other way.

VII. Variations by Subject Area

While an attempt has been made to identify the achievements, limitations and disadvantages of the AAT, these are bound to vary among different subject areas. Even where the same features can be found, the strength and relevance of the arguments inevitably vary among different subjects, particularly if there are differences in the appeal structures that would be the most feasible alternatives.

For these reasons it was obviously a sensible decision to prescribe the jurisdiction of the AAT by compiling an itemized list rather than by attempting any comprehensive definition. The difficulty, of course, lies in the creation of a decision-making process for determining where the jurisdiction should be applied that will be sufficiently thorough and attentive to consequences. The dangers are first, that the process will be too political and insufficiently analytical; secondly, that it will begin with a bias or presumption, using generalities rather than analysing the significance of the jurisdiction in the particular situation; and thirdly, that arguments of principle will tend to dominate to the exclusion of any impact analysis.

CHAPTER TEN

Options for Canada

The purpose of this Study Paper is not to promote or to discourage the adoption of an administrative appeals tribunal structure in Canada, but rather to provide an understanding of the role of the AAT in Australia, and to assist the reader in assessing the potential of a similar institution here.

It would be easy to dismiss the idea of an administrative appeals tribunal by suggesting that the institutional or other circumstances of Canada are different from those of Australia. For his part, however, the author has not discovered any crucial difference. One argument raised elsewhere is that we already have in Canada a more extensive range of specialized and sophisticated administrative tribunals than exists in Australia. That, however, is not relevant to anything except the scope of the jurisdiction. If any model of administrative appeals tribunal is created, it would seem self-evident that its jurisdiction should exclude the decisions, or at least many types of decision, made by an administrative tribunal operating on a due-process model. For example, it could be unfortunate to have the licensing decisions of the Canadian Radio-television and Telecommunications Commission subject to appeal to an administrative appeals tribunal, though such decisions are within the jurisdiction of the AAT in Australia (see e.g. *Re Control Investment Pty Ltd*).

The merits of any proposal for an administrative appeals tribunal can be addressed more intelligently if it is assumed that its jurisdiction would be confined to certain decisions of government departments, and of some other agencies, where there appears to be a need for a new and external appellate structure. In any event, a judgment would have to be made situation by situation about whether the jurisdiction of an administrative appeals tribunal was appropriate.

Of course there are also some differences between Australia and Canada in the distribution of legislative powers. For example, benefits similar to those provided in Australia under the federal social security system are provided in Canada partly by the provinces (under family benefits and general welfare legislation) and partly federally (particularly under the unemployment insurance system and the Canada Pension Plan). But again, it is difficult to see that these differences are relevant to anything except perimeter questions in defining the jurisdiction of any new appeal tribunal. They are surely irrelevant to the merits of establishing an administrative appeals tribunal.

The author feels that while an administrative appeals tribunal functioning on the adversarial model, as in Australia, would be better than no change, it would be a weak option compared with other possible improvements, and that it should not be our highest priority in the reform of administrative law. My thoughts on possible alternative avenues of development are as follows.

I. The Revision of Primary Adjudication

Some of our systems of primary adjudication show the same weaknesses as those in Australia, and perhaps even more so. Yet when complaints are made about primary adjudication, the remedy often suggested is another level of appeal, or some other revision of the appeal structure. That is plainly irrational. If any appeal structure is to work well, and is not to produce an uneven justice by using more favourable criteria for those who complain, it should be a way of correcting the occasional errors that occur in a system of primary adjudication designed to reach the right answers in the first place, and which is otherwise working well.

Systems of primary adjudication could well be reviewed to ensure that those making the decisions have the ability, the seniority, the time, and the working environment to gather the evidence, to recognize what is required, and to make the same kind of intelligent judgment as might be made eventually in an appeal structure. Above all, the conduct of each case should be in the hands of someone with the authority and the ability to make the decisions and to communicate as necessary for that case. This must include personal investigation and the receipt of evidence and argument firsthand. To the fullest extent possible, therefore, primary adjudication should be local.

For certain categories of decisions, reasons should be required to be issued with the decision and regardless of any request. A primary goal here is to ensure that decisions are made for reasons that can withstand reflection, at least in the mind of the decision-maker. That goal is not achieved if reasons are only formulated later in response to a request. What is commonly needed is not the legal style of "reasons for judgment," but simply a few sentences in plain English to explain why and how the particular conclusion was reached.

The main problem seems to be that ordinary political and bureaucratic pressures militate against efficiency in primary adjudication. Thus the paramount need is for an ongoing countervailing pressure, and a method of meeting that need is my next suggestion.

II. The Abolition of Reconsideration

As in Australia, several of our systems provide for reconsideration prior to any appeal tribunal having jurisdiction. The objections to that practice have been summarized above (see Chapter Five, section V). It is even worse when, as under some of our systems, the decision made by an official on the reconsideration is portrayed to the applicant as a decision of the Minister. For ordinary people, unfamiliar with the distinction between formalities and realities, the portrayal of the decision as having been made at the apex of the pyramid is bound to discourage the exercise of their rights of appeal.

The practice of reconsideration ought to be abolished. Since the practice results from normal political and bureaucratic pressures, it would have to be prohibitied by statute. Moreover, it would have to be somebody's job to enforce the prohibition and there would have to be sanctions. The right to go to an appeal tribunal would then arise immediately upon receiving the primary decision. A much-needed pressure would then be created for a structure of primary adjudication more conducive to thoroughness and accuracy.

Of course some kinds of cases require more senior talent than others. Bearing in mind, however, that most people dealing with government agencies are not represented by professional advisers at this stage, a regime of unequal justice is created automatically if the level of seniority at which a matter is decided depends upon whether someone complains after receiving a negative decision. Abolishing the practice of reconsideration would help to ensure that a system of pre-screening is used, with cases being assigned to different levels of seniority according to the type of adjudication the issues require, rather than according to whether the applicant is quiescent or makes a complaint.

III. An Administrative Appeals Tribunal Established on an Inquisitorial Model

The suggestion here is an appeal tribunal with a structure, staff, physical plant and procedures designed for an inquisitorial rather than an adversarial process. The tribunal members would be responsible for initiative in the identification of issues and in the investigation of the complaint, sometimes including field-work. Appropriate staff would be available for limited roles in the processes of investigation. To ensure the continuing availability of prompt adjudication as a pressure for quality control in primary decision-making, any attempts at conciliation would be strictly prohibited.

The rigid demands of the adversary system, such as that all evidence and arguments should be adduced at a "hearing," would be abandoned, but the basic elements of procedural fairness would be observed, such as the right to know the nature and extent of any adverse evidence, and the right to be heard. Advocacy would be permitted, but it would be supplemental. The tribunal would not depend upon advocacy, and indeed, would be designed to operate without advocacy. The tribunal itself would question and where necessary cross-examine witnesses, though with any advocates usually being allowed to participate.

This does not mean that advocacy would be discouraged or impaired. Paradoxically, advocacy can be more useful and effective in the context of an inquisitorial process. The more discursive style of interaction can enable the advocate to understand more clearly the concerns of the tribunal, and vice versa.

In establishing the qualifications for membership of such a tribunal, experience in the adversary system would have to be a disqualification, or at least be seen as a handicap.

There would be no concept of a trial *de novo*. The file of the agency of primary adjudication would usually form part of the material considered and investigated. In this way the appellate tribunal could have a beneficial influence on the structure of primary adjudication as well as on adjudicative criteria.

An appellate tribunal established on such an inquisitorial model could have great potential, but the political prospects of establishing and keeping it in operation are not encouraging. The tribunal would operate contrary to the usual training and inclinations of the legal profession in this country, and the pressures could be enormous to convert the institution to an adversarial model. Moreover, it could be impossible politically to create an administrative appeals tribunal of any kind in Canada without allowing a further right of appeal to the Federal Court, or at least judicial review in the Federal Court, and that would create another pressure for the tribunal to operate on an adversarial model. It could also undermine the prospects of hiring people of a high enough calibre to serve on the tribunal.

There may even be doubts now about the constitutional validity of such a tribunal. One judge of the Supreme Court of Canada has expressed a willingness to incorporate the separation of powers in the *Charter of Rights* (Wilson J. in *Operation Dismantle*, 1985 at 491), and if that restrictive view should prevail, it might be impossible for any government to establish any court or adjudicating tribunal on an inquisitorial model.

Perhaps a possible way of establishing an administrative appeals tribunal on an inquisitorial model, with its decisions being final, might be to establish an alternative and concurrent jurisdiction in the Federal Court. The applicant would have the choice. In practice, most applicants could be expected to choose the tribunal for reasons of cost, speed and convenience, but the availability of the court alternative might help to overcome any political and constitutional difficulties.

IV. A Legal Audit

An alternative that the author has considered is whether fidelity to law in government departments and agencies might be promoted by some form of legal audit. The potential contribution of the legal profession to fidelity to law is surely not confined to its role in adversarial proceedings. Could a government-appointed lawyer function in an audit role, checking records, often by random sample, and interviewing staff to determine whether a department is fulfilling its legal obligations?

The rationale for this suggestion is that there is no necessary correlation between suffering and complaining, and relief from injustice will not come on a sufficiently broad scale if it is only provided in response to the pursuit of a complaint by the victim. Many and probably most citizens do not have professional representation in their dealings with government, and many of the categories of people most vulnerable to abuse in governmental decision-making may also be the people who lack the self-confidence, assertiveness or resources to pursue any opportunities that may exist for an appeal.

Government departments and agencies are subject to a financial audit, but this does not address fidelity to law in more than a very limited way. Its traditional purposes have been to ensure that payments are not unauthorized or wasteful, and that revenues are properly accounted for. In more recent years, the financial audit has expanded into other aspects of efficiency. To the extent that it deals with law, however, the financial audit still tends to focus on whether the department or agency has made unauthorized expenditures rather than on whether it is performing its legal obligations.

On reflection, however, the author is skeptical about whether the creation of a legal audit would really be beneficial. In the range of career opportunities available to lawyers, this would probably rank as one of the least glamorous, and it is doubtful whether it would attract the level of talent required to make it effective.

Secondly, many of the statutes in controversial subject areas confer powers rather than impose duties on the administering agencies. If the legal audit were confined to duties, it could miss most of the problem areas. If the legal audit included the exercise of discretionary powers, it could probably do so only in a limited way by reference to certain standard criteria. It could not question the exercise of policy judgment.

Thirdly, law is often a matter of interpretation. The prevailing interpretations would often be those of senior management within the department or agency, who in many cases would themselves be lawyers. They might well feel a legitimate cause for concern if their interpretations were subject to challenge by someone perceived as more junior, and who was seen to lack their understanding of the history, context and purpose of the particular legislation.

The argument is much stronger, however, for a more limited type of audit function. This would be to ensure that whatever rules are being applied by a government department or agency are out in the open. Adjudicative manuals should be available to the public, and adjudicative criteria should be in the manuals. Any secret interpretations of the statute, or other secret adjudicative criteria, whether contained in memoranda or in verbal staff training, should be exposed and published, and the secrecy should be subject to condemnation.

The argument against secret law seems to be generally accepted now in the federal administration in Canada. What remains outstanding is some kind of monitoring to ensure that the prohibition of secret law is effective. This more limited function, however, does not require legal talent. Perhaps it could be added to the responsibilities of the Auditor General.

V. An Ombudsman

Another possibility is obviously the creation of a federal Ombudsman in Canada. This has been the subject of much debate already, and the author will not attempt a further contribution in this paper.

The list in the preceeding five sections covers only reforms that might be adopted on a broad scale. Obviously other developments might be appropriate to particular situations, such as a specialized appellate tribunal or a new internal appeal structure operating with procedural fairness.

CHAPTER ELEVEN

The Way Ahead for Canada

I. Introduction

Some possible options for Canada were summarized in Chapter Ten. The purpose of this chapter is to consider the way in which the matter might develop, particularly having regard to the well-established existence in Canada of sectoral appeal tribunals, and other avenues of appeal in particular subject areas.

The rationale for having any appeals at all has been discussed in another Study Paper (Wilson, 1986), which also described the range of administrative appeal structures currently existing in Canada and the limitations of judicial review.[20] Those matters will, therefore, not be covered in this paper.

II. The Need for Area Studies

Any choice between an administrative appeals tribunal or the continuation of sectoral appeals, or other possible options in relation to appeals, cannot be made intelligently unless it reflects a clear understanding of the significance of the options regarding each subject area covered by the choice. This understanding can only be achieved by an impact analysis relating to each area. The significance of the options will vary greatly among different subject areas according to the substantive nature of the decisions, the public and private interests involved, the policy goals, the composition and organizational structures of the clientele groups, volume, tradition, and the complexity of the subject.

What is being suggested here is not a series of area studies focusing on appeals and aimed at selecting the most appropriate appeal structure for each area. That would be counter-productive. The most appropriate appeal structure for any subject area cannot be considered intelligently in isolation from the structure and nature of primary adjudication, policy-making, regulation-making, investigative techniques and strategies, and sanctions.

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20. The limitations of judicial review are also discussed in T.G. Ison, "The Sovereignty of the Judiciary" (1986) 27 Les Cahiers de Droit 503.

In other words, no official attempt should be made to identify the appeal structure most appropriate for any particular subject area except as and when the government is ready to undertake a more comprehensive study of that area. An analysis of the problems, the substantive law, the policy goals, the institutional practices and the pressures should come first. It is only in this context that structures for primary adjudication and for appeals can be considered in a way that will enable the implications of the choices to be understood.

Perhaps as one aspect of this concern, any study that was limited to appeal structures would be likely to involve a wrong emphasis. There is an obvious risk of too much weight being given to the adoption or development of general principles, that "reasoning" would be accepted as a substitute for inquiry, and that conclusions would be reached without an adequate understanding of the significance of what was being proposed. Uniformity would also be likely to have an undue influence. For all these reasons the achievement of public-policy objectives would be likely to suffer. Moreover, the extent to which diversity is purposeful or senseless could not be judged fairly in a study limited to appeal structures, and which, therefore, would almost inevitably be biased in favour of uniformity.

Area studies are needed to analyse the significance of lobbying pressures and other manifestations of political power in relation to the subject area, particularly if the subject is one involving conflicts between public-policy objectives and private interests. For example, if the normal incidence of political power in the subject area supports the pursuit of public-policy objectives, an appeal structure may well play a useful role in protecting private interests. Conversely, if the subject is one in which the normal incidence of political power would tend to promote private interests and frustrate the achievement of public-policy objectives, the addition of a new appeal structure might simply aggravate that problem.

Area studies are also needed to ensure that the complexity of each subject area is properly understood. The creation of new appeal structures through any overall study of appeals would run the risk of the bull-in-the-china-shop approach to law reform. The complexity of a subject area could be unrecognized, but that is not the only risk. An inquiry that undertook a general study of appeals would not be in a strong position to question the credibility of assertions of complexity made by the departments or tribunals concerned, and for that reason, the complexity of a subject area could sometimes be overestimated.

Area studies could be carried out with greater sensitivity to the dedication and experience of people in the departments and other agencies whose work might be affected by any new appeal structure. Of course their views might reflect some negative influences, perhaps conflicts of interest, perhaps tunnel vision. Those are reasons for subjecting departmental views to a careful scrutiny, but they are not reasons for ignoring them. Departmental input to a study focusing on the work and output of that department is essential both for accuracy in fact-finding and to promote confidence in the departments about the thoroughness of the inquiries. An inquiry can only reach the required depth of analysis if it is focusing on the role of government in relation to a subject area, rather than on appeal structures.

Finally, any intelligent decision-making about new appeal structures must involve field-work. It must involve a substantial presence of the decision-maker in the

department or agency under study to understand its goals, structure, practices, problems and methods of work. Moreover, the study should probably include survey work. For example, if there is an existing appeal structure, what is the extent of its use? What are the factors that ration its use (delay, cost, location, ritual, pageantry, etc.)? What are the experiences of those who have used the appeal structure, or who have elected not to use it when they might have done? What is the feedback influence of appellate decisions on primary adjudication? Does the existing appellate structure tend to promote or defeat the policy goals of the system? Other inquiries could be directed to the abuse of any existing appeal structure, and to the prospect of abuse of any proposed innovation. Existing statistics and other recorded data are generally inadequate to answer the crucial questions.

There is a risk that the results of this process could reflect and perpetuate irrational differences. The recommendations resulting from subject area studies might vary, not merely in response to differences of need discovered in the process of investigation, but according to differences in values among different investigators that lead them to begin their work with different assumptions, or to weigh the variables differently. While this risk may be a real one, the author believes, for the reasons explained earlier, that it is a risk that should be taken. Moreover, it is a risk that can be reduced by the production of some general guidelines; the following comments attempt to make a preliminary contribution to that process.

III. The Procedural Dilemma

While it has been argued that the only efficient way to consider the revision of appeal structures is by area studies that also deal with other aspects of the areas, this may be politically the most difficult way of proceeding. Whether one favours the development of an administrative appeals tribunal functioning on an inquisitorial model (as the author prefers), or one operating on an adversarial model (as in Australia), or some other reform in appeal structures, the process of consideration suggested above involves an inherent dilemma. One could not establish a new appellate tribunal without concurrently providing for it to have some jurisdiction. On the other hand, one could not, through a series of area studies, propose any jurisdiction for a new tribunal unless the creation of that tribunal has reached at least the design stage.

The author feels, therefore, that the best course would be to proceed in the following stages:

1. Publication of the working papers.
2. If, after considering the feedback, the Law Reform Commission should decide in favour of some kind of administrative appeals tribunal, publication of a report that would include
   (a) the design of the proposed tribunal (but without recommending any particular jurisdiction); and
   (b) guidelines for development of the jurisdiction of the tribunal in subsequent subject area studies.

The need for these area studies has been explained above, and some suggested guidelines will be mentioned below.

3. Consideration of appeal structures in the context of subject area studies. Most activities of government are subject to review from time to time, sometimes by a Royal Commission, sometimes by the Law Reform Commission, and sometimes by some other type of inquiry. The selection of the most appropriate appeal structure for any particular subject area should be considered in those contexts. The need for such consideration might also be a part of the stimulus for creating a commission of inquiry in relation to a subject area.

4. As soon as some substantial jurisdiction has been determined for the administrative appeals tribunal, a Bill establishing the tribunal could be introduced in Parliament.

Alternative procedural options exist. One would be to have a single continuing body (like the Administrative Review Council in Australia) making the recommendations relating to the jurisdiction of the administrative appeals tribunal. But that could involve an indefensible bias in favour of inclusion, which would be aggravated if, in practice, an onus were placed on each department or agency to justify any exception to the jurisdiction. The main objection to such options, however, is that they would involve changing appellate structures without an adequate understanding of the significance of what is being done in relation to each subject area.

Although it is proposed that decisions about the revision of appellate structures ought to be made in the context of subject area studies, something more of a general nature can be said about the development of appellate structures in Canadian public administration. The comments that follow might also serve as a starting point for the development of the guidelines just suggested under point 2(b).

IV. The Option of No Appeal

The proposition that "there has to be some kind of external appeal" (see Wilson, 1986) is not one that should be accepted as a starting point. There exist a great variety and volume of governmental decisions on which there would surely be a consensus that no right of appeal should exist, or about which the wisdom of any right of appeal would be debatable.

First, there are the decisions of a type traditionally classified as administrative: the decision of a prison administrator about what kind of chairs to order, for example, or whether to paint the corridor walls. There is probably a consensus that the establishment of an appeal structure for decisions of that type would not produce any public benefit worth the cost. Any complaints about decisions of that type are generally considered more appropriate for administrative or political processes, and of course such decisions are also subject to scrutiny by the Auditor General.

Secondly, there are rationing situations where the number of applicants or contenders exceeds the number of applications that can be granted, or the number of awards that can be made. Examples might include the award of government contracts,

grants, prizes, appointments, and promotions. In at least some of these situations it might be impossible to allow any right of appeal to a disappointed applicant or contender without creating damaging delays in the decision-making, and without creating at least embarrassment for innocent people who have been successful in the process. In several of these situations, furthermore, a right of appeal could be a negative influence on the integrity of initial decision-making.

Thirdly, there are the situations where an applicant for something (for example, a pilot's licence) may be required to pass some kind of examination or test as a condition of eligibility. Any complaints about the propriety of the test can be difficult to investigate, and can also become a diversion from the merits. In at least some of these situations a right of appeal might well be counter-productive, and an opportunity to be retested or re-examined may be more appropriate.

Fourthly, in some subject areas the decisions at first instance are already made by a sophisticated administrative tribunal operating on a due-process model. In these situations, any right of appeal or further right of appeal could be counter-productive, particularly if the proceedings have already been complex or lengthy, or if the resolution of the matter is urgent. Moreover, any new right of appeal could generate oppression, abuse and injustice if the subject area were one involving disputes between parties with different levels of resources.

Fifthly, there are the tribunals, such as the Canada Labour Relations Board, whose membership includes people considered to be representative of the interest groups affected by the decisions. It may well be inappropriate for decisions of a tribunal composed in that way to be subject to any appeal to a tribunal of more general jurisdiction.

This last example, however, leads to another point. While the composition of labour relations boards qualifies them to deal with the bulk of the cases they decide, it may be almost a disqualification from dealing with certain types of cases. For example, it may well be thought inappropriate to have a labour representative drawn from a sector of the trade-union movement and a management representative both adjudicating on a case that is essentially a dispute between two unions. The same composition may also be inappropriate where a worker disputes a position taken by both his union and his employer. These problems can be ameliorated, but they cannot be solved, by adjusting the composition of a labour relations board for such cases.

There is something to be said for the view that those types of cases should be decided by a different tribunal. If that view were to be accepted, however, the different tribunal should be one that deals with those cases at first instance, not on appeal. This may illustrate a point of broader application. If any kind of administrative appeals tribunal is to be created, it may be unwise and unnecessary to stipulate that its jurisdiction should be exclusively appellate. There may be a limited range of matters that it would be appropriate for the tribunal to decide at first instance, and this option could well be included in the design.

The examples mentioned under this heading are not intended to be exhaustive. They are mentioned to demonstrate why any development of new rights of appeal should proceed cautiously, and why the process should not begin with any assumption that a right of appeal is always desirable.

V. Internal Appeals

Where it is accepted that a right of appeal should lie from any decision, it seems to be the instinct of many lawyers to believe that the appeal should be to a body that is external to the institution of primary adjudication, and that is independent. Yet in some senses of the term, an internal appeal structure may be more "independent" than an external one. For example, if the system is one in which primary adjudication is done by a large number of adjudicators on the staff of a board, and an appeal lies from their decisions to the commissioners of the board, the appeal may be to people who are geographically separated, who come from a different socio-economic and professional background, who are appointed in a different way, and who may have a broader outlook.

The ordinary court system is often seen as a model, and yet the nature and degree of independence in the ordinary court system is often overestimated. The separation of a court of appeal from a trial court may appear in the statutes and in the other formal documents, but the two courts may be more of a blended institution in other ways. For example, the judges are appointed in the same way, they come from the same profession and usually the same socio-economic background, they may be on the same social circuit, and a court of appeal might share a building with the trial court. Yet these features are not generally considered to impair the validity of the appeal structure.

Obviously it would be objectionable if the adjudicators or the managers of primary adjudication were able to give direction to or exercise any control over the appellate body, but internal appeal structures need not operate in that way. For example, in a board structure where the final appeal lies to the commissioners of the board, the appellate body may be giving direction to the primary adjudicators, not vice versa. In that respect, the structure may be similar to the ordinary court system in which appellate tribunals give direction to primary adjudicators about the criteria to be applied.

An internal appeal structure can also co-ordinate the development and application of policy. Once it is recognized that appellate adjudication, at least at the final level, is policy-making, a system can be subject to conflicting policy sources if those who promulgate policy in this way are separated from those who promulgate policy in other ways.

Moreover, if the person who is promulgating policy through the appellate process also has the authority to give executive direction to those responsible for primary adjudication, that person is in a good position to ensure that policy decisions made in the appellate process are applied at first instance. As well as providing for the co-ordinated development of policy, this can help to maintain a basic principle of equal justice: that adjudicative criteria do not vary according to the level at which a case is decided.

Again, it may be possible to attract a higher calibre of personnel to the top level of administration if they also have the final appellate jurisdiction. If appeals at the highest level go elsewhere, primary adjudication is more likely to be under the direction

of someone with a managerial-administrative background who is less sensitive to procedural fairness and other requirements for a good quality of adjudication.

If the chairman of the final appeal tribunal is also the chief executive in relation to primary adjudication, that can have other advantages. Perhaps the most obvious is that the diversity of function can make the appellate position more attractive. Adjudication at any level can become boring if one does nothing else. A more important point, however, is that this structure may enable hearings to be scheduled and decisions to be made without delay. If the chairman of the tribunal is spending most of the time on executive functions of a type not requiring fixed-time appointments, it may be feasible to schedule hearings and write the decisions with no delay at all.[21] Where appeals at the final level are decided by a tribunal that has no executive or other responsibilities, it seems to be in the nature of things for a schedule of pending hearings to build up into a backlog, and for any sense of urgency to be lost.

An internal appeal structure can also facilitate surveillance over primary adjudication, and can be a form of quality control. For example, it can assist the chief executive in identifying types of cases suitable for more senior talent. Moreover, this structure enables the training of primary adjudicators to be achieved by example as well as by instruction. This structure also provides an intelligence source for decisions about personnel selection, qualifications, training, the development of adjudicative criteria, and the institutional literature. If the chairman of the final appeal tribunal and the chief executive responsible for primary adjudication are not the same person, it is unrealistic to believe that these benefits can be achieved by any communication between them, or that they can be achieved to the same extent in any other way.

Of course there can be disadvantages to an internal structure of appeals. Political pressure, or isolation causing intellectual incest, can create a distortion in fact-finding. This can take a most insidious form if the opinions of an internal expert are always accepted at face value and without cross-examination. If the same expert dominates all levels of adjudication, the resulting structure might be no better than the denial of any right of appeal.

The point of this discussion is not to demonstrate that an internal appeal structure is always better than an external one, or vice versa. Rather it is to show why the option of an internal appeal structure should not be discarded or ranked as inferior by any preliminary assertion of principle. It should be among the options considered in subject area studies.

Where it is considered that a system should include both internal and external appeals, there seems to be an instinctive assumption that the final level of appeal should be external. Here again there is no valid reason why the design of an appellate structure should begin with that type of assumption.

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21. This was the position when the author was chairman of the Workers' Compensation Board in British Columbia. A hearing, if required at the final level of appeal, could be held as soon as the appellant was ready. It was usually held within a few days of receiving the notice of appeal. Decisions were generally issued immediately after or within a week of the hearing. The reason was that most of my time was spent on executive and system-planning functions, and most of this work did not require fixed-time appointments. There was no difficulty, therefore, in giving priority to the appeals.

If the intermediate level of appeal is normally the final level on questions of fact, it might sometimes be possible to capture the advantages of internal and external appeals by making the intermediate level external and the final level of appeal internal. The final appellate tribunal might then be in a better position to ensure that its decisions are followed at first instance, and the problem of conflicting policy sources might be avoided. At the same time an appellant might have the satisfaction of knowing that the conclusions of fact reached in the particular case have been freed from any pressures that might operate within the internal system.

Finally, it is important to recall that this discussion concerns internal systems that have the basic structural and process requirements for an appeal, particularly the right to be heard. For the reasons explained in Chapter Ten, internal processes of reconsideration which lack those requirements ought to be abolished.

VI. Sectoral Appeals or an Administrative Appeals Tribunal

If the Law Reform Commission of Canada eventually recommends in favour of some kind of administrative appeals tribunal and the Government adopts the recommendation, it would have to be determined which decisions should be subject to appeal to the administrative appeals tribunal, and which should be subject to appeal to a sectoral appeal tribunal. It has been argued earlier that these determinations should be made in the context of subject area studies, and not by any sweeping initial decision. These area studies would also include the options of an internal appeal structure and no appeal at all. The following comments relate only to situations for which some kind of external appeal is considered desirable.

Several arguments favour the use of sectoral appeals. Perhaps the most obvious concerns the expertise of the tribunal, particularly where the subject area can be technical and complex, such as patents. Yet a tribunal of general jurisdiction need not be non-expert. It could be established with divisions and with quorum rules requiring, for example, that in certain subject areas two out of three members of the panel should be designated experts in the subject. The inclusion of an intelligent non-expert could provide a measure of innovation that would challenge the assumptions of the experts in a way that would not occur in a purely expert panel, and if the experts are always in a majority, there may be little risk of the generalist doing any harm.

Related to the question of expertise, many types of decisions involve the exercise of discretionary powers. Some of these decisions may require depth in a particular subject area, and therefore be more appropriate to a sectoral appeal, while others may require a breadth of vision that might be found more easily in an appellate tribunal of more general jurisdiction.

The significance of depth and expertise may vary, but perhaps not very much, according to the volume of appellate work. If the volume is high, the required expertise can easily be provided for in the appointments and in the experience of an appellate tribunal of general jurisdiction. If the volume is very low, any required expertise may only be obtainable in a tribunal whose members serve on an occasional and part-time basis. That type of quorum could be designed into an administrative appeals tribunal,

or into a sectoral appeal, but it is probably more easily entrenched in a sectoral appeal structure.

Sometimes it might be considered appropriate that an adjudicating tribunal should include the nominees of interest groups. For example, labour relations and unemployment insurance in Canada have both included tribunals with representatives of labour and management. That type of composition might be possible in an administrative appeals tribunal, but it is more readily achievable in a sectoral tribunal.

Some types of decisions may be purely adjudicative, but in other types of decisions the adjudicative component may be inextricable from the development of departmental or political policies. This has often been said to be the position regarding many types of governmental decisions on transport. Where this is the case, it may well be legitimate to have a sectoral appeal structure that has a connection, properly recognized by statute, with the development of departmental or ministerial policy.

A strong argument for sectoral appeals might be found in any perceived need for procedural diversity, particularly concerning delay. In matters of health and safety, for example, it may be of paramount importance that decisions should be made quickly, and that the tribunal should be adamant in disallowing any adjournment, at least without making an interlocutory order. In another subject area, a more ponderous process could be beneficial, or at least relatively harmless. A liberal attitude to adjournments might accommodate the needs of the parties and facilitate thoroughness in preparation. It could be difficult to accommodate different speeds of functioning and other aspects of procedural diversity in an appellate tribunal of general jurisdiction, and there is an obvious risk of a damaging pressure to procedural uniformity.

Finally, lawyers in general practice may find it cumbersome to familiarize themselves with the procedural variations of a range of tribunals, but someone whose work is concentrated on a particular subject area may, even without legal training, have no difficulty in mastering the processes of a tribunal specializing in that subject. Thus an appellate tribunal of general jurisdiction may tend to attract lawyers in general practice, with a consequential tendency to focus on general principles of law and with a pressure to adopt the procedures of the adversary system. Conversely, a sectoral appeal tribunal may attract fewer lawyers from general practice and more lawyers who specialize in the substantive subject area, together with lay advocates. This may tend to focus the process more on the merits of the case and on the policy and goals of the system. It may also encourage the tribunal to adopt procedures tailored to the subject area.

There are, however, several advantages that an appellate tribunal of more general jurisdiction can have over sectoral appeals. Perhaps the most important ones involve the notions of equality before the law and equality in the distribution of political rights. If the appeals of major corporations and of citizens with low income go to the same tribunal, they might receive the same quality of justice. If they go to different tribunals, there may be a greater prospect that the higher levels of adjudicative talent will deal with the corporate interests and that ordinary people will receive a lesser quality of justice.

Again, an appeal tribunal of general jurisdiction may have a stature that makes it clearly independent of government departments and other agencies. A sectoral appeal

tribunal may be more vulnerable to capture, either by the related government department or other institution of primary adjudication, or by a pressure group. For this reason, too, an administrative appeals tribunal may offer more protection to the rights of those who lack political clout. Related to this, systems intended to protect working people or the unemployed are commonly subject to pressures in their administration that are more negative than the balance struck in the legislative process. If the statutory rights of the groups intended to be protected by the legislation are to be observed, it is essential to have an adjudicative structure that is isolated from political pressures.

A sectoral appeal tribunal may be more vulnerable to improper kinds of political pressure, particularly if a minister, official or powerful lobby group, who or which is known or believed to want certain kinds of decisions, also recommends, controls or decides on the appointments, renewals, promotions, budget or levels of pay at the tribunal.

Another factor, which can be a crucial one, is how in any particular subject area the choice between an administrative appeals tribunal or a sectoral appeal tribunal would affect the centralization or local distribution of appellate facilities. Centralization can help to facilitate uniformity. It might also be harmless in a subject area that requires a high level of expertise which, for other reasons, will be centralized in any event.[22] However, if the appellate tribunal is intended to be accessible to ordinary people, if it is intended to resolve issues of credibility, or if for other reasons local discussion is important, it may be crucial for the appellate facilities to be as local as possible. Whether an administrative appeals tribunal or a sectoral appeal tribunal would be more amenable to decentralization is a question the answer to which will vary among different subject areas, just as the need for decentralization will vary.

A further significant factor may be the extent to which the particular subject area is discreet compared with the extent to which it intersects with other subject areas. If a particular case is one that involves overlaps between systems, it might be possible to achieve finality, consistency, and a more prompt appellate adjudication with an administrative appeals tribunal structure than with sectoral appeals. Suppose, for example, a person with a disability, or alleged disability, is claiming a veteran's benefit, and also or in the alternative the unemployment insurance sickness benefit followed by a Canada Pension Plan disability pension. Risks of inconsistency might be avoided, delay might be reduced, and a higher quality of justice might be achieved at lower cost, if all of the claims could be brought to finality in one appellate process.

These advantages and disadvantages of an administrative appeals tribunal compared with those of sectoral appeals are not intended to be exhaustive. They are intended to illustrate that the applicability and weight of the advantages and disadvantages will vary greatly among different subject areas. It may well be a sensible outcome, therefore, to develop some kind of administrative appeals tribunal in certain subject areas while leaving sectoral appeals in others.

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22. Perhaps patents might be an example of this.

VII. Cost

Any type of external appeal tribunal will generally cost more than a purely internal appeal structure. There is, however, no a priori reason why some kind of administrative appeals tribunal would cost more or less than sectoral appeals.

In some subject areas an administrative appeals tribunal may achieve economies of scale, while in others there may be diseconomies of scale. For example, a higher-volume administrative appeals tribunal may enable appeals in different subject areas to share the same premises, communications systems, computer facilities, library resources, laboratory resources, etc. On the other hand, a low-volume sectoral appeal tribunal might be able to function very well without any permanent premises, and the members might be functioning on a part-time basis as required at hourly rates. Greater efficiency may also be achieved through the chairman having more personal control.

Here again the merits of an administrative appeals tribunal compared with those of a sectoral appeal system in any particular subject area can only be assessed by an intensive and empirical study of that subject area, and not by any attempt to develop and then extrapolate from any general principles for the design of appellate structures.

CHAPTER TWELVE

Conclusion

The value of an administrative appeals tribunal compared with that of sectoral appeals cannot properly be determined by developing any principles of broad application. This and other choices relating to appeal structures can only be made most intelligently in the context of subject area studies.

The AAT appears to produce beneficial results in the cases with which it deals, and it also has a strong and beneficial influence on fidelity to law within government departments and agencies. These are major achievements and they were unlikely to have been brought about in other ways. Yet the AAT is still an institution that is collateral to the main problems in quasi-judicial administration.

An appellate structure like the AAT could offer an avenue of appeal to correct the occasional mistakes made in any system of primary adjudication that was well designed and working reasonably well, but commonly that is not the situation. Often the structure of primary adjudication is fundamentally defective, and the jurisdiction of an administrative appeals tribunal may entrench that problem by creating the illusion of a solution. The probabilities are that among those who suffer injustice from the deficiencies in primary adjudication, the administrative appeals tribunal would see no more than a small tip of the iceberg, and only in a proportion of the remainder would the injustice be rectified in some other way.

For decisions of a type that may require investigation, or that may be difficult, controversial, or potentially negative, the need for some basic principles of procedural fairness and for a high calibre of analytical talent is probably as great or greater in primary adjudication as it is on appeal. Yet under the current structure in Australia, as in Canada, the most basic requirements of procedural fairness are commonly ignored in primary adjudication. So too is the need for legal and analytical talent. Then on an appeal to the AAT, there can be an excess of legal talent, and procedural formality can be carried to the excessive extreme of almost rigid adherence to the adversary system. There is a manifest need for a more balanced mixture of legal and other talents at all levels of adjudication.

Observation of the AAT in Australia is an enlightening experience, and we could well learn more from it. Such an institution could be an improvement on existing structures in Canada, but for the reasons explained above, other reforms, and particularly the first three mentioned above, would also offer great promise.

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